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INTERNATIONAL LAW

PART I

PEACE

By

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JURISPRUDENCE

PREFACE TO THE FIRST EDITION.

THIS volume, and that on war which it is hoped will follow it, are not intended as an encyclopaedia of international law. The aim has been to give a knowledge of the most important topics to English university students and average Englishmen interested in public affairs, neither of them a class which can devote very much time to a single science, and to put them in a position to appreciate the discussions on other topics as they arise in the foreign affairs of the country.

We have not attempted a deductive treatment. Such a treatment might start from state sovereignty or from the assertion of certain rights as inherent in a state, but it would lead in many cases to the admission of clashing sovereignties or rights, that is to no result, unless the starting-points were defined with a precision only attainable by embodying the conclusions in them. International sovereignty and rights are the growth of recent centuries, and the very object of our science is to ascertain the point at which they now stand. Some of the earlier stages of that growth were assisted by theories of a law of nature and nations, of which what is good survives under the name of justice, a ground more solid but less capable of being systematised, while the attempt to transfer wholesale to associations what is true of natural individuals was bound to fail.

We have not treated *ex professo* of the history of international law, though much of it appears in the discussion of particular topics. It is idle to discourse of the history of a science to those

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who are only beginners in the science itself. If this volume and the contemplated one on war should be followed by a volume dealing with topics unsuited to the introductory character of their predecessors, it would be natural that the history of international law should be one of them.

We quoted Mr Hall's excellent treatise on our subject by §§, hoping that this might be more convenient than quotation by pages to those who should use a different edition. Unfortunately the last edition, which appeared while this volume was passing through the press, omits the division into §§.

Our thanks are due to the proprietors of the International Journal of Ethics for permission to reprint the article on International Arbitration.

J. WESTLAKE.

25th August 1904.

PREFACE TO THE SECOND EDITION.

IN this edition only those changes have been made in the text which recent events rendered necessary. The new matter has been put in the form of notes to the Chapters.

J. WESTLAKE.

23rd March, 1910.

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CHAPTER I.

GENERAL VIEW OF INTERNATIONAL LAW.

Definition of International Law.

International Law, otherwise called the Law of Nations, is the law of the society of states or nations. In this we have to make clear what is meant by states or nations, their society, and law.

States, Nations, Nationalities.

It is the experience of every man of European blood that he lives in a state, which in its turn lives among states. We Britons are subjects of a state called the United Kingdom, equivalent for international purposes to the British dominions, and this in its turn lives among a number of states including, for example, France, Germany, and the United States of America. Each of the states which have been mentioned has two remarkable characters. On the one hand it is the largest or highest and most comprehensive unit in which law and authority are applied to individual men by courts of justice and officers of government. The duty of an individual to answer for his actions and to obey is enforced by a scale of courts and authorities ascending to the highest British, French or other, and there it stops. There is no international court or authority to which an individual is responsible. On the other hand each of the states mentioned has relations with other states, such as peace, war, treaties, arbitrations and so forth. These two characters do not always go together. Take for

example Austria-Hungary, composed of the empire of Austria and the kingdom of Hungary, each having final authority over its subjects, but neither having separate relations with states outside the composite whole which they form, the only relations entertained by them with outside states being those of Austria-Hungary as a single state. A state which has relations with the outside world, whether it be single, as the United Kingdom, France, and the United States of America, or composite as Austria-Hungary, is and is called a state of international law. A political body which, as such, has no relations with the world at large, but is a supreme unit to individual men, such as Austria or Hungary separately, is not a state of international law, yet cannot be denied a proper claim to the name of a state.

But there are instances in which the name "state" is used of something which does not possess either of the two characters in question. Thus the component so-called states of the United States of America and of the Commonwealth of Australia, by the constitutions of the larger bodies of which they are members, on the one hand are not in all respects supreme over the individuals belonging to them, and on the other hand are not permitted to have relations with any states outside those larger bodies. The original components of the United States of America, as Massachusetts and New York, became states of international law when they won their independence, but since by the terms of their union they have lost both the possibility of foreign relations and even complete supremacy at home, the name of state has been retained by them only as a memory. In the Australian Commonwealth the name is not even a memory. There the parts, as New South Wales and Victoria, have always been included in the British dominions, and have now received the name of state by way of compliment, no doubt suggested by the American instance, in which also the members admitted from time to time, as Kentucky and Ohio, are put on a par with the original members by receiving the complimentary name of states.

Thus the word "state" is used for three different kinds of political bodies, states of international law, states which are supreme over their subjects though not states of international

law, and so-called states which are not even entirely supreme over their subjects. The two former may however be called states proper, and we shall always assume that the states we speak of are states proper, unless it is otherwise expressed. The context will show whether a state of international law is intended.

We further see by reference to our common experience that a state proper is an ideal body, which on the one hand has a certain territory, and on the other hand is a society composed of individual men as its members, and having a corporate will distinct from the wills of its members. And a little reflection will show us that since the individual men associated in the state are moral beings, and the action of the state which they form by their association is their action, the state must also be a moral being, having a responsibility and a conscience which are the summation of the responsibilities and consciences of its members. In this character of a moral being, having a corporate will, responsibility and conscience, a state is capable of being a subject of law and having rights.

The individual members of a monarchical state are distinguished as the sovereign, a title always given to the monarch, and his subjects, though the latter are also subjects of the state, and are often spoken of as such. The individual members of a republican state are called its citizens, and are in truth subjects of the state although not commonly called subjects. All the members of a state, whether sovereign, subjects or citizens, are denoted by the convenient name of its nationals. When a state has an autocratic ruler for its sovereign it might be thought at first sight to have no corporate will distinct from his will; but in truth, even then, its corporate will appears as distinct in the rules which determine the succession or election of the autocrat, and in the rule which makes it the duty of all the other members of the state to obey him. Sometimes an autocrat has decreed a change in the rules of succession, but such cases must be regarded as revolutionary, and where the autocratic decree is ultimately obeyed, which does not always happen without civil war, the corporate will of the state reappears as distinct in the acceptance, immediate or ultimate, of the new rule.

A nation, as the word is used in the term "law of nations"

and generally in the language of international law, means a state considered with reference to the persons composing it. Such also is the usual meaning of the word in the English language when civilised people are spoken of. When we speak of the British nation we mean the British state considered from every point of view but that of its territory. Even when uncivilised people are spoken of as nations, the term sets them before us as possessing such organisation as they are capable of. A nationality on the contrary is a mass of individuals who, whether organised as a state or not, are grouped together by their consciousness of possessing common characters comparable in nature and importance to those which are usually possessed in common by the nationals of a state. Hence nationalities often aspire to be separate states, but by no means always. Some nationalities are content with a limited degree of political separateness, and others do not aspire to any political recognition but are content with the self-conscious feeling, which may be a useful stimulus to exertion in self-culture and the pursuit of reputation.

What are or may be the characters of a nationality cannot be said more precisely than has been said above by comparing them to those of a nation, because nothing general can be affirmed about common characters possessed by the members of a nation. There are many instances in which the boundaries of states cut across common characters without giving rise to any demand for political redistribution. We can only say that whatever unites a nation in feeling, or contrasts its members with those of other nations, may serve as the basis for a nationality. Such characters are language, religion, temperament, the possession of common memories, the entertainment of common political or social beliefs or aspirations. Another is race, which is often put in the forefront, but the different races of white men are not so definitely distinguished from one another as what in natural history are called varieties. They are continually being modified by circumstances similar to those through which they arose out of a common stock, such as climate, food, and the effect of habits and institutions both on the moral temperament and on the physical structure; and they are continually being blended by mixture of blood, through conquest and emigration.

Community of language and temperament in a population often causes a belief in its being or belonging to a distinct race, although its physical peculiarities may fail to mark it off as distinct or to identify it with the race to which it is supposed to belong, and its history cannot be traced far back without encountering evidence of blending. In fact the indefiniteness and instability of all the characters on which nationalities are based are a conclusive objection to founding international rights on nationality, as was proposed by many eminent Italian jurists at the time when the unity of their country was being achieved. Nationalities, though often important in politics, must be kept outside international law.

Law, National and International.

Laws may be divided into laws proper and laws metaphorical. The best marked examples of laws proper are those of a state, and the circumstance that these apply uniformly to all the cases which fall within their formulas is the foundation of the metaphor by which the name of law has been extended to those of nature, for the laws of nature tell us that in given circumstances certain other circumstances will uniformly be also present or follow. Thus the law of gravitation is that, given two particles of matter, they will uniformly, that is to say in all cases, attract one another according to the law of the inverse square. But outside the element of uniformity the contrast is complete. The laws of nature express what is: the universe is constructed on a system of which the law of gravitation is a part. Laws proper express what is to be done: contracts are to be observed, certain conduct is to be avoided on pain of punishment. The laws of nature cannot be broken: an instance breaking an alleged uniformity would prove that the supposed uniformity, or so-called law, did not exist. Laws proper are broken whenever that which they direct is not done, and are not the less broken although the breach may be redressed or punished.

The typical instance of law proper is, as we have said, the law of the land, or national or state law, often called municipal

law, although that name ought to be avoided, because municipalities within a state have their own subordinate laws to which the name municipal law is appropriate. The law of the land emanates from the corporate will of the state, which is manifested both in the particular commands which any officers of the state may be empowered to give, and in certain uniform or general rules. Its manifestations of the latter kind are made, first, through the law courts, which declare the corporate will in case of doubt or resistance, and are expected to declare it uniformly in the cases which come before them; secondly, through the executive machinery which enforces the judgments of the law courts; and thirdly, in the way of legislation, by enacting statutes as general rules for the guidance of the law courts, or by enforcing, and so adopting, the general rules on which the law courts proceed. Whether enacted or tacitly adopted these general rules are the law of the land, the national or state law, the law of the state society.

Now when international law is claimed as a branch of law proper, it is asserted that there is a society of states sufficiently like the state society of men, and a law of the society of states sufficiently like state law, to justify the claim, not on the ground of metaphor, but on the solid ground of likeness to the type. In order to see whether this is so, let us take some examples of rules prevailing between states. It is a rule that a foreign crowned head is not subject to the jurisdiction of the law courts of a state of which he enters the territory, although much may be said for the opinion that he ought to be subject to it. Again, it is a rule that the commerce of a neutral state in time of war may be interfered with by the belligerents on the grounds of breach of blockade and carriage of contraband of war, although much may be said for the opinion that the commerce of a neutral ought to be exempt from all interference by the belligerents. A state which attempted to defy those rules, however honestly convinced it might be of the wisdom of the contrary opinions, would find itself practically unable to do so. It would practically be like an Englishman who should try to defend an action for the price of goods by saying that he was honestly convinced that such an action ought to be barred in three years instead of six, which is also

an opinion for which much may be said. A state trying so to act would find itself met by a real compulsion, not indeed applied through law courts and an executive, like the compulsion within a state, but through the action of individual states, upheld by the general sentiment and sufficient to prevent such attempts being made. Accordingly the facts are that:

(1) The general opinion of states approves certain rules, not as expressing conduct to be recommended without being enforced, like telling the truth or being charitable, but to be enforced by such means as exist.

(2) The conduct directed by those rules is in fact generally observed by states, and that, not as freely choosing it in each instance, but as obeying the rules; not necessarily from fear of enforcement, but at least from the persuasion that the rules are law.

(3) Such observance so greatly promotes the tranquillity of the world that a duty of observance, correlevant to the benefit enjoyed, is laid in conscience on states, at least in ordinary cases. There are rare cases in which it is right to disobey even the law of the land with a view to bringing about its amendment, but where the contact between a number of individuals is close, as it is between states, settled rules, even though not the best, are at least provisionally better than none.

These things being so, states live together in the civilised world substantially as men live together in a state, the difference being one of machinery, and we are entitled to say that there is a society of states and a law of that society, without going beyond reasonable limits in assimilating variant cases to the typical case. As is fitting in a science dealing with living subjects, in which there is always so much shading off, we have not made the classification of law depend on a verbal definition like those of geometry, but have followed the practice approved in natural history, in which classifications are founded on likeness to types. In doing so, we have been able to keep in touch with the common English usage, which does not hesitate to give the name of laws to the rules of all societies in which obedience is enforced by the regular or irregular action of their members. To the same effect is the old saying, *ubi societas ibi jus est.* And

we have regarded our subject exactly in the light in which it is placed by Hall, who says:

"International law consists in certain rules of conduct which modern civilised states regard as being binding on them, in their relations with one another, with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement." *Treatise on International Law*, p. 1.

Austin's Limitation of the term "Law."

The denial of the name of law to our subject is principally connected in England with the name of John Austin, who taught that law is a general command given by a superior, individual or composite, to the persons who habitually obey him. All other senses of "law" he regarded as improper or metaphorical.

In order to bring national law within so narrow a description he had to pick out among the members of a state the one or more persons in whom, by its constitution, the law-making power is placed, and to treat the law of the land as the body of general commands issued by him or them, and obeyed by the other members of the state as well as by himself or themselves when not acting in the law-making capacity. The law-makers or superior he called the real sovereign, and he and his followers have shown much ingenuity in pointing out what persons constitute the real sovereign under the constitutions of various countries.

Since the society of states has no sovereign over it, and is at best very ill-organised, Austin could find in it no such superior and inferiors as his description of law demanded. Therefore what is commonly called international law he proposed to call positive international morality. By positive, he meant what in jurisprudence is commonly meant by that term, namely that the rules so described are sufficiently enforced and observed to have an objective existence, but by making them a branch of morality as distinguished from law he ran counter to the received use of the latter name, and his nomenclature failed to mark that the subject is connected with justice as a special

branch of morality, and that other ethical duties remain incumbent on states though outside the rules in question.

Continental Nomenclature.

We have seen that the leading idea which determines the use of the English word "law" is enforcement through the action, regular or irregular, of a society. The connotation of right is absent from the word. We can say that a law is unjust, or wrong, which is the contrary word to right, and ought to be altered, without questioning or impairing its character of law. But the words which in Latin and the continental languages correspond most nearly with "law"—*jus*, *droit*, *recht*, etc.—have something of the meaning of "law," but they also and principally mean "right," and carry a suggestion of that meaning into any use which may be made of them in jurisprudence. Any suggestion of enforcement, or of positive or objective existence, which they may carry with them, is so weak that when intended to be dwelt on it has to be enforced by suitable words or by the context. In such expressions as *le droit français* or *das deutsche recht* the notion of positiveness is included because the law of a country is strictly enforced, and the notion of right is excluded because right is not limited by frontiers. But the expressions *le droit international* or *das völkerrecht* rather suggest a system embodying right, so that you could not properly say of its rules that they are unjust or wrong and ought to be altered, as you can of the rules contained in a system described as international law. The system is placed on the level of what in English we call law by the qualification "positive"—which Austin employed, only in connection with morality instead of law—or by the qualification "European," which carries the suggestion of positiveness much as *français* carries it in *le droit français*. And so the full translation of "international law" is *le droit international positif* or *das positive völkerrecht*, to which *le droit international Européen* or *das Europäische volkerrecht* are equivalent expressions.

Of course, on the continent as well as in England, statesmen and writers must often refer to received rules, and often in

doing so sacrifice something to brevity. It must not therefore be supposed that an abstract right is always intended when *le droit international* or *das völkerrecht* is mentioned. But, on the other hand, no care that can be practically looked for can entirely eliminate the effect of the assumptions which are tacitly made in the language used. Hence some confusion necessarily arises, but on the whole we may say that the different connotations of "law," on the one hand, and of *jus*, *droit*, etc., on the other hand, cause a difference between the English and continental modes of looking at our subject. In estimating the mutual obligations of states an Englishman appeals primarily to international law, as a body of rules considered with regard to their reception. He may make some allowance for the desirableness of their being improved, and may occasionally justify, as a matter of conscience, disregarding them with a view to bringing their improvement about. A continental, especially if he is not a statesman obliged to deal with facts, appeals primarily to *le droit international* or *das völkerrecht* as a standard of right independently of its reception. He may make some allowance for practice, but on the whole received rules count for less with him than with us, and what he considers to be justice counts for more, though he is thereby exposed to the risk that even in good faith he may mistake his interest for the measure of justice.

It must however be borne in mind that, even from the English point of view, the received or positive rules must not be treated as isolated ones, but must be co-ordinated, and their application must be controlled by the science of jurisprudence. That science teaches principles and a method which are common to all law proper, and that the rules received between states are susceptible of such treatment and require it might have been mentioned as another point in which they are comparable to the law of the land. And this circumstance tends to bring English and continental views about international obligations into greater harmony than the contrast of meaning between "law" and *droit*, or *recht*, might at first lead one to suppose. For, true as it is that *droit* and *recht* mean "right," still they do not mean right in the unlimited sense which that term oftenest bears in English, namely what commands moral

approval on whatever ground, but right in the special sense, not altogether foreign even to the English term, of that which is required by justice. Thus a continental thinker has to distinguish his *droit* or *recht* from conduct which he would approve on the ground of generosity, temperance, or any other virtue than justice; and in doing so he has to employ principles and methods the same or akin to those of jurisprudence. Thus the difference between English and continental thought on the mutual obligations of states is attenuated but not destroyed.

The Law of Nations.

We have now considered separately, first the word "nation," to which in this subject *gens* in Latin, *volk* in German, and so forth are equivalent, and secondly the words "law," *droit*, and so forth. A few remarks are now necessary on the combination of those words in the phrases "international law," *jus gentium*, "law of nations," and so forth; though it is not our intention in this chapter to enter at any length into the history of international law. Whatever may have been the manner and date of the introduction of what was called the *jus gentium* into the private law of Rome, it is certain that at least from the time of Cicero *jus gentium* was understood to mean those principles of right—right in the special sense of justice—in which all the nations with whom the Romans had dealings were agreed; *jus naturale* was understood to mean those principles of right which were recommended by a philosophical view of the nature and situation of man; and these two were believed to coincide because it was thought that only nature could be the cause of so general an agreement. Thus Gaius says that *jus gentium* is "what natural reason establishes among all men[1]." This view of principles extended to public as well as to private relations, on many points in both of which the nations known to the Romans were agreed. Thus Pomponius relates that in a case where ambassadors were at Rome at the time when war was declared against their nation, it was determined that they remained free in accordance with the

[1] Gaius, 2, 65; 1, 1; Just. *Inst.* 1, 2, 1.

jus gentium[1]. Ulpian however, noting that some legal institutions are based on natural facts common to men with other animals, defined *jus naturale* as "that which nature has taught all animals, and from which come the union of male and female called by us marriage, and the procreation and education of children[2]." Justinian adopted that definition from him, and thenceforward the names *jus naturale* and *jus gentium* were used to denote different sets of rules. No one indeed seems again to have based a classification on the difference between facts common to all animals and those peculiar to man, but the habit of identifying *jus gentium* and *jus naturale* was broken, and new lines of demarcation were found between them. In the seventh century Isidore of Seville, enumerating the subjects comprised in *jus gentium*, mentions only such as belong to international law, with the single exception of prohibitions to marry foreigners; principles of national law which are common to all nations fall into his *jus naturale*. His definitions were generally copied during the middle ages, but with the revival of learning the classical use of *jus gentium* and *jus naturale* was revived, the one for the principles of right, whether public or private, accepted in the world contemplated by the particular writer, and the other for the principles of right taught by nature; but the classical identification of those principles was not revived. On the one hand a wider knowledge of the world had disclosed that none but the simplest principles receive a really universal assent, and with the failure of universality the old argument for a natural origin failed also. On the other hand new philosophical views questioned the natural origin of some things which were generally assented to in the world to which the European writers belonged, and it thereby became necessary to refer those things to human will. So it came about that Grotius described *jus gentium* as that law which has received its obligatory force from the will of all or of many nations[3], and devoted his famous treatise to ascertaining by the testimony both of facts and of authorities what that law prescribed in the case of

[1] Lib. xxxvii ad Quintum Mucium, in *Dig.* 50, 7, 17.

[2] Just. *Inst.* 1, 2.

[3] *De Jure Belli ac Pacis*, 1, 1, 14.

international relations, and to discussing the corrections (*temperamenta*) which might reduce it to the measure of the natural law as modified by the Christian principle of love to one's neighbour. The corrections which he demanded have been largely realised, as well as others of which he did not dream, and yet more are needed to perfect international relations.

Hence the *jus gentium* of Grotius, as far as it concerns international law and is considered as a term of classification and not as denoting the particular rules which he classified under it, is equivalent to *le droit positif des nations* or *das positive völkerrecht*, and in English would be sufficiently rendered by "law of nations," to which the addition of positive is unnecessary, law being always positive. If combined with the corrections or *temperamenta* thought by the particular writer to be necessary to bring it into accordance with right, it would become simply *le droit des nations* or *das völkerrecht*, though we should have to call it the ideal law of nations. In every way "law of nations" and "international law" are equivalent terms, and so are *le droit international* and *le droit des nations* or *das völkerrecht*.

CHAPTER II.

THE SOURCES AND PRINCIPLES OF INTERNATIONAL LAW.

The Sources of International Law: Custom, Reason, Roman Law.

Custom and reason are the two sources of international law.

Custom must not be confounded with mere frequency or even habit of conduct. In any state or other society in which customary law is admitted, custom as a part of law means the conduct which is enforced as well as the strict or loose nature of the society allows—not always very well, even in the case of national law in the ruder stages of national existence—and which is followed as well from the fear of such enforcement as from the persuasion that the received rule requires such conduct to be followed. In other words, custom is that line of conduct which the society has consented to regard as obligatory. We have seen that international law is law just because the conduct which it directs has the character thus described, so that for custom to be a source of international law follows from the definition of each. Even for those who seek for international right—*le droit international* or *das völkerrecht*—custom must be a source of such right so far as the existence of the custom carries a presumption of its reasonableness, and so far as in ordinary cases there is a duty of conscience to follow it at least provisionally until it can be amended.

Reason is a source of international law not only for the seekers after international right, who will appeal to reason as a

check on custom, but for all, and for two causes. First, the rules already regarded as established, whatever their source, must be referred to their principles, applied, and their principles extended to new cases, by the methods of reasoning proper to jurisprudence, enlightened by a sound view of the necessities of international life. Secondly, the rules as yet established, even when so applied and extended, do not cover the whole field of international life, which is constantly developing in new directions. Therefore from time to time new rules have to be proposed on reasonable grounds, acted on provisionally, and ultimately adopted or rejected as may be determined by experience, including the effect, not less important in international than in national affairs, of interest coupled with preponderating power.

With both custom and reason in our subject Roman law is so intermixed that its position requires a separate notice to make it clear. Modern international law arose at a time when the larger part of the world was subject to monarchical rulers with whom their states were identified, and the Roman law was held to apply between such persons as being the law common to them. The states of other than monarchical constitution which had dealings with monarchs or with one another would have had to submit to the rules which naturally existed in the more general case, even if, by claiming rights as moral beings, they had not brought themselves under the Roman law as the one code then deemed to be obligatory on moral beings. The rules which flowed into international law from this source are now incorporated with the customary law of nations, and such is the respect still generally entertained for the Roman law, which has been called written reason, that this part of the customary law is never controverted even by the seekers after international right, although it may be the subject of some of the controversies which are waged about the interpretation of texts. Further, in applying to international law the methods of reasoning which belong to jurisprudence, it is the reasoning of Roman law that has been applied, that system being common not only to the continent of Europe but also to the English Court of Admiralty.

The Evidences of Custom in International Law.

On the evidences of custom in international law we will take the liberty of repeating what we have said elsewhere.

"The consent of the international society to the rules prevailing in it is the consent of the men who are the ultimate members of that society. When one of those rules is invoked against a state it is not necessary to show that the state in question has assented to the rule either diplomatically or by having acted on it, though it is a strong argument if you can do so. It is enough to show that the general *consensus* of opinion within the limits of European civilisation is in favour of the rule.

"The best evidence of the consent which makes international law is the practice of states appearing in their actions, in the treaties they conclude, and in the judgments of their prize and other courts, so far as in all these ways they have proceeded on general principles and not with a view to particular circumstances, and so far as their actions and the judgments of their courts have not been encountered by resistance or protest from other states. Even protest and resistance may be too feeble to prevent general consent being concluded from a widely extended practice." The increasing frequency of international arbitration now calls for the special mention, among the evidences of this class, of the judgments of arbitrators, particularly of such as may be given by the court established in pursuance of the Hague Convention of 1899, to which practically all states of international law are parties.

"The arguments adduced by statesmen in despatches and other public utterances are very important as showing what were the principles proceeded on, especially in the case of treaties, which are so often concluded with a view to particular circumstances that great care must be taken in using them as evidences of international law.

"Special authority is often claimed for the practice of those states which are most concerned with a particular branch of international law, as for that of the chief maritime powers with regard to the laws of maritime war. There is a good foundation

for such a claim in the fact that the powers most concerned with a subject must understand it best, and be best able to distinguish good from bad reasoning about it. On the other hand, special knowledge is often accompanied by the bias of special interest. But when the states most concerned with a subject in turn apply the same rules and suffer their application, that bias may be supposed to be eliminated, and the agreement which those concerned in the vast majority of cases find suitable must count for a general agreement in spite of much comparatively speculative criticism from other quarters.

"The opinions of private writers must of course be counted towards the general consent of men, especially when the writer's reputation proves that he represents many persons besides himself. Moreover, for much of international law, which is so well observed that discussions about it between states are not easily quoted, its admission into accredited text-books is valuable testimony to its being observed as law, and not from any option still remaining free to states. And when a rule is disputed, or there is a question whether an old rule ought to be changed or a new one introduced, it is only through public discussion that reason can be made to appear and prevail.

"Time cannot supply the want of general agreement, but where the agreement in favour of an altered or added rule is sufficiently general, it is an element in determining the limit of the forbearance to be shown to a state which persists in resisting the change or the addition. When reasoning has stood the test of time, it can be no longer urged that it resulted from caprice, or from the undue consideration of a transitory interest."

Maxims on the Obligation of Received Rules and on the part of Reason in International Law.

On the part of reason in international law, and on the obligation of received rules, which is closely involved with the question of the true part of reason, we have said the following elsewhere.

"International rules ought to be made with due care that they shall not restrict liberty more than is necessary, that they shall be suited to the cases which most commonly arise, and that reciprocity in their application shall be possible. It is no reason for not applying a rule that a different one would have been better suited to the particular case.

"In matters transcending the state tie, and so far as a rule founded on the consent of a society is wanting, the men who guide the action of states have only to obey their consciences. The want of a rule to define the action allowable does not exclude all action. The largest field for the application of this principle is in dealings with states or populations not having the civilisation necessary for forming part of the international society, but the principle is sometimes applicable between states included in that society.

"When a state has to act although a rule is wanting, it ought as far as possible so to act that a rule might be framed on the precedent.

"The obligation of international rules on the conscience, even when they have once been founded on a general *consensus*, is subject to exception, as is the obligation of state law on the conscience. And in the former department the conscience will have a somewhat greater latitude than within a state, because there is no international legislature, and diplomatic agreements for the change of a rule can with difficulty be made to comprise so large a number of states as to prove that the general opinion has been changed; wherefore an international rule can rarely be changed otherwise than by its ceasing to be followed and general approval being given to such change of practice, of which some state must set the example. Hence it is not a conclusive, though a strong, argument against a state that it has itself applied the rule of which it resists the application. It would be contrary to the moral nature of man that he should be fettered, absolutely and permanently, by any external rule.

"When a state is confronted by a rule which it deems to be bad, either originally or because it has become bad through a change of circumstances, it ought to take into account the greater or less evil which always results from violating known

rules, and, if it decides to violate the rule in question, it ought as far as possible so to act that a better rule may be framed on the precedent. Neither in violating a rule nor in acting where a rule is wanting is a state at liberty to consider only its particular case, without reference to the conduct which would be best suited to the cases which most commonly arise[1]."

[1] The quotations in this and the preceding section are from *Chapters on the Principles of International Law*, Westlake, 1894, pp. 78—85.

CHAPTER III.

THE CLASSIFICATION OF STATES.

International law being the law of the society of states, we have next to consider what varied phenomena of state existence may be presented by states of international law.

Independent or Sovereign States.

Independence means freedom from control, and a state like the United Kingdom or France is independent because it is free from all control either over its internal government or over its foreign relations. Such a state is also called in international law a sovereign state, a term of which the explanation is historical. It has already been observed, in speaking of the debt which international law owes to Roman law, that in the late middle age and early renaissance periods most of the important states were under monarchical government, and their monarchs, who by their internal constitutions were called sovereigns, were identified with them in their foreign relations. To this day, when a treaty is concluded by a monarchical state, it is its sovereign—whether his title be emperor, king, grand duke or any other—that is named as the party to it. Hence the rules of international law were regarded as existing between sovereigns, and republics had for the purpose of those rules to be ranked as sovereigns. Hence again to be an independent subject of the rules of international law, or an independent member of the international society, became equivalent in the

language of our science to being sovereign; and as the notion of the state distinct from its rulers was drawn out into greater clearness, international, which may also be called external, sovereignty came to be regarded as an attribute of the state without reference to its form of government. It is therefore altogether different from the internal sovereignty of the king or other head of the state, where a head with the title of sovereign exists, and for English readers it may be useful to add that it is also different from the sovereignty imagined by Austin as belonging to the persons in a state who have the law-making power. But since the sovereignty of a monarch implies supreme government, and an independent or internationally sovereign state has the supreme government over its territory, and to some extent over its subjects wherever they may be, the different uses of the word "sovereign" are sufficiently analogous not to offend against propriety of speech.

Dependent or Semi-Sovereign States.

It is not necessary for a state to be independent in order to be a state of international law. That a state should be subject to limitation or to the control of another state in its internal government and yet be free in its foreign relations is scarcely possible, but it often happens that a state which is subject to the control of another state in its foreign relations, or which can take international action only to a limited extent, is more or less free in its internal government. Such a state is in a position different from New York or Victoria, because its foreign relations are its own though controlled or limited, but it is dependent or inferior, while the state which controls its foreign relations, or the federal body which limits them, may be called its superior. It may be supreme over its own subjects, but not being an independent member of the international society it will not be externally sovereign, and its position is described as one of semi-sovereignty. In that term all the possible forms and degrees of dependence are included, and it has therefore been proposed to substitute for it part-sovereignty, which in strictness would be more correct; but the change is unnecessary,

since no one will suppose that "semi-" implies an exact half, or that any quantitative division of sovereignty is possible.

What is essential to observe is that for every part of the population and territory of the civilised world the full powers of a sovereign state must exist in some quarter. That must be so, not only for the benefit of the population and territory in question, but also for that of the rest of the world. Foreign states must be able to find some ultimate depositary of power with which to deal for the settlement of the affairs that may interest them in connection with the given region, whether in seeking redress for wrongs or in making international arrangements. Therefore whatever elements of external sovereignty an inferior state may lack must belong to its superior, whether that be a single state controlling its foreign relations or a federal body limiting them.

Independence, unlike sovereignty, cannot be qualified as "semi-" or described as partial, because it negatives dependence and negatives admit of no degrees. When it is desired to point out that an inferior state has a political existence separate or distinct from that of the superior, it should be described as a separate or distinct state, not as an independent one.

Protectorates.

One form in which dependence or semi-sovereignty occurs is that of protectorates. In some of these the protected state is left free from interference within its own territory, while in others a certain authority is given within its territory to the protecting state, but in all it is arranged that the former shall enter into no treaty or have any diplomatic intercourse with outside states without the consent of the latter, expressed or inferred as may be stipulated, and any contrary attempt at such treaty or intercourse is regarded by the protecting state as a hostile act against it on the part of the outside state concerned as well as on the part of the protected state. It is not necessary that the name "protectorate" shall be used in the arrangement. The fact that the inferior state is not free to seek aid and alliances elsewhere will of itself impose on

the superior the duty of protecting it against wrong, and the fact that outside states are not free in their choice of methods for seeking redress from the inferior will impose on the superior a responsibility for the wrongs committed by it. That responsibility will in its turn give to the superior state the right to control such action of the inferior as might involve it, and even express provisions for the freedom of the inferior in its internal affairs must be interpreted as being subject to that right.

A protectorate must not be confounded with simple protection, which one state may bind itself to give to another without impairing the latter's capacity for action in foreign affairs. An example of that kind is furnished by the little republic of San Marino among the Apennines, which from the beginning of the seventeenth century enjoyed the protection of the Pope under a formal treaty, and which from 1862 has been taken under "the exclusive protective friendship" of Italy, but which has a *chargé d'affaires* at Paris, and consuls in various places of Italy, France and Austria[1]. Another example was formerly that of the principality of Monaco, protected at different times by Florence, Spain, Savoy, France and Sardinia, but which practically renounced the protection of the last named, or of Italy into which Sardinia expanded, by ceding a portion of its territory to France without Italian concurrence, and now stands unprotected in the enjoyment of the remainder[1]. The position which Napoleon I assumed towards the short-lived Confederation of the Rhine was also nominally one of simple protection, though he was really its master[1]. It is little likely that such cases will be multiplied in future: the power which promises protection will generally require an equally formal recognition of the corresponding rights, which will turn the relation into a protectorate.

A standard instance of a protectorate was that of Great Britain over the Ionian Islands, which by treaties of 4 Nov. 1815 between England and Russia, Austria and Prussia, were declared to form a free and independent state under the immediate and exclusive protection of the king of Great Britain and Ireland. This was a signal abuse of the word "independent," but the republic so

[1] All these instances are mentioned in 2 Rivier 92.

established lasted till 1863 when the Islands were annexed to the kingdom of Greece. Internally the whole of the executive authority was practically in the hands of a British commissioner, and the republic could neither accredit nor receive diplomatic representatives, nor could it accredit consuls although it received them, the protecting power exclusively representing it abroad. On the other hand, the treaties of Great Britain did not affect the republic unless the former expressly stipulated for it as the protecting power, its vessels carried a separate trading flag, and the British Court of Admiralty decided that it was neutral during the Crimean War, in the declaration of which by Great Britain it had not been named[1]. Among the protectorates now subsisting, two of the most important are those of Great Britain over the sultanate of Zanzibar and of France over Tunis and its bey. The so-called protectorates over uncivilised regions in which there is no state to be protected, which have been assumed by Great Britain and other powers and which are treated of under that name in the General Act of the African Conference at Berlin, have nothing but the name in common with the state relation now under consideration. They have been called colonial protectorates, and will be explained in connection with the acquisition of territory, to which head of international law they properly belong.

The question has been raised whether an armed contention between two states whose relation to one another is a true protectorate is a war or a rebellion. The answer appears to be that the distinctness of the two states makes a war of the most regular kind theoretically possible between them, and that the war of 1895 between France and Madagascar was such an actual case; but that if by the arrangement between them the protecting power has a large share in the executive authority of the protected state, the subjects of the latter may not be able to organise such a war without being insurgents in their own country.

[1] *The Ionian Ships*, 2 Spinks 212.

Suzerain and Vassal States.

Superior and inferior or protecting and protected states are sometimes called suzerain and vassal, but this is a loose diction, and should be avoided. "Suzerain" and "vassal" are terms of mediaeval origin, and strictly imply two relations which the feudal system in its full development united. One was the personal relation of fidelity, binding the man to the defence of his lord and the lord to the protection of his man. The other was the proprietary and especially feudal relation by which the vassal's fief might be bound to make certain payments to the suzerain, or to render to him certain military or other services, and was subject to forfeiture on the vassal's breach of fidelity or failure to perform the attached obligations, and to escheat on failure of his heirs of the particular description pointed out by the tenure, but in the meantime was his property. The position either of suzerain or of vassal might be filled by a community as well as by an individual, and the little republic of Andorra in a valley of the Pyrenees exists to this day under the joint suzerainty of the bishop of Urgel in Spain and France as successor to the Counts of Foix. But the great example of feudalism and suzerainty was furnished by the Holy Roman Empire, which ended in 1806 by the abdication of the last emperor. Long before that time, in an age when property and the right to govern were ill distinguished, the legal doctrine that neither dues, services, nor the liability to escheat and forfeiture impaired the vassal's right of property while it lasted, had caused the presumption to be in his favour on all doubtful points of government. The argument was enforced against the ill endowed though suzerain emperors by the power and ambition of the greater states of Germany, and for centuries before the end of the empire came the imperial vassals had acted and been recognised as international sovereigns, making war and peace with full independence[1].

The term "suzerainty," little used in Western or Central Europe since 1806, has since been revived in connection with the gradual emancipation of the provinces of the Turkish Empire

[1] Grotius 1, 3, 23; of which section the summary is *summam potestatem habere posse qui feudi lege teneatur.*

chiefly inhabited by Christians. The Ottoman sultans created a privileged position for Moldavia and Wallachia by ordinances, called capitulations, of which the earliest dates from 1396; and when in 1856 those provinces and Servia were erected by the treaty of Paris into autonomous principalities, that is principalities enjoying separate internal government, the name of suzerainty was given to the position reserved to Turkey with regard to them[1]. Similarly, when in 1878 these principalities became independent states by the treaty of Berlin, Bulgaria was made an autonomous principality under the suzerainty of the sultan, which she remained until she became an independent kingdom in 1908. Each of these treaties defined certain points in the relations between the principalities in question on the one hand and the suzerain power and foreign states on the other hand, but neither defined the suzerainty, and the correlative description given to Bulgaria at Berlin was not vassal but tributary. In practice, the tendency was to allow to Bulgaria the powers left open by the treaty of Berlin, and so it may be said that, as in the later days of the Holy Roman Empire, the presumption in doubtful points was against the suzerain. Nor did the sultan do anything to merit, or even to claim, the better position which a suzerain of the early middle ages may have held, for when Bulgaria was unjustly attacked by Servia in 1886 he did not move in her defence, as in that character it would have been his duty to do. During her vassality Bulgaria had direct relations with foreign states and concluded treaties with them, at least on certain subjects, though no doubt the consent of the sultan would have been required to important treaties concerning her. She had therefore to be described as a semi-sovereign state, but Turkey, the state which retained so much of the sovereignty as did not belong to Bulgaria, could not without absurdity be described as holding a protectorate over her. Bulgaria was rather under the simple, but not formally promised, protection of the great powers.

The mention of the privileged portions of the Turkish empire makes this an appropriate place for speaking of Egypt,

[1] Expressly in the case of Moldavia and Wallachia, while Servia was to "hold of the Sublime Porte," a term of vassality, and therefore implying suzerainty as its correlative.

a privileged province in which the family of Mehemet Ali governs under a series of firmans granted by the sultans, at present with the title of khedive or viceroy, and with large powers of internal government, as well as some right of diplomatic intercourse with foreign states. The practical authority is however in the hands of Great Britain under an occupation which began in 1882, and the case is too anomalous to admit of classification.

Nor can a section on suzerainty be closed without adverting to the late South African Republic, which has become by conquest the Transvaal Colony of Great Britain. The convention of Pretoria in 1881 established that territory as a republic under the suzerainty of the Queen of the United Kingdom, without defining that term, but with articles expressing the respective rights of the parties. By the convention of London in 1884 those articles were changed and the word "suzerainty" was not repeated. It became the subject of discussion whether that word was intended still to apply, but, even allowing that it did so, the precedents which we have had to notice would make it difficult to extract from its undefined use any further rights of the British Crown than were expressed in the articles. The point however was not really material, for the articles contained such a restriction of the power of the republic to conclude treaties with foreign states as clearly placed it in the position of an inferior and Great Britain in that of the superior state, and the relation between the two might not inappropriately have been described as a protectorate.

Neutralised States.

There are in Europe three states—the republic of Switzerland, the kingdom of Belgium, and the grand duchy of Luxemburg—which are bound to permanent neutrality by treaties with the great powers, these in their turn guaranteeing that neutrality. This peculiar situation—in which Switzerland was placed in 1815, Belgium from the erection of that kingdom after the revolution of 1830, and Luxemburg in 1867 in consequence of the dissolution of the Germanic Confederation of which it had been a member—must be mentioned here in order to guard

against the error which has sometimes been committed of supposing that it impairs the sovereignty of the states in question. It must be observed that the situation is practically the same in the three cases. In none is the independence of the state expressly guaranteed, and in that of Switzerland the guarantee is expressed as being, not of her neutrality, although that is recognised, but of the integrity and inviolability of her territory. But these forms are really equivalent, since the neutrality of Switzerland could not be infringed with any effect if her territory were not touched.

The effect of a guarantee is not to shift the primary burden of the guaranteed debt to the shoulders of the guarantor, and so one of these neutralised states, if unjustly attacked, will be expected to defend itself to the best of its ability while calling on the guarantors for aid. Nor can it be said that a neutralised state has renounced the right of seeking redress by war for wrongs committed against it, though it would certainly be bound first to request the guarantors to assist it in obtaining redress by diplomatic means. But by the position which it has accepted it has relinquished the right to intervene for the redress of wrongs suffered by others, and it must abstain from all political alliances and combinations, since, although these may have the general good for their object, it is seldom that their object is attainable without the employment or the menace of force. Even a customs union between Belgium and either Germany or France, or a treaty stipulating such differential duties as might lead to the suppression of the line of customs on the Belgian frontier, has been objected to by the guaranteeing powers as tending to a political alliance or combination[1]. These restrictions however leave the larger part of the field of external activity open. The neutralised state may conclude commercial treaties, enter into postal, monetary and other non-political unions, join in conventions or declarations for the amendment of international law, and so forth; while even the warlike action of which its neutralisation is intended to preclude the occasion may, as we have seen, be called for in defence of its territory or its rights. Neutralisation therefore does not carry with it the renunciation of any faculty of state life. It is merely an undertaking not

[1] Van de Weyer, in *Patria Belgica*, part 2, pp. 341, 2.

to do certain things, and no more impairs sovereignty than does an undertaking not to intervene in a particular war, or not to levy more than particular rates of duty on importations from a given country.

Besides, we have seen that it is necessary that for every part of the civilised world the full powers of sovereignty should exist. If therefore a neutralised state were semi-sovereign, it would be necessary to point out in what superior state, or in what federal system of states, the powers of sovereignty wanting to it were to be found. But the neutralised states form part of no federal system and are not tied to any other states as their superiors. Therefore they are not semi-sovereign but fully sovereign.

The subject of neutralised states having been introduced, it may be well to despatch at once certain considerations respecting it which might equally have been noticed under the head of treaties. Treaties of neutralisation are concluded with reference, express or tacit, to the territory belonging at the time to the neutralised state. The guarantors do not undertake the defence of any extension which that territory may receive without their consent. And if the neutralised state extends its territory without the consent of the guarantors, it raises the dangerous question whether the guarantee continues to exist even for its original territory, to the defence of which the dispersion of its forces over a larger area may render it incapable of contributing in the degree expected when the guarantee was given, at the same time that its extended limits may involve it in other causes of quarrel than could then have been foreseen.

On the other hand, treaties of neutralisation are exempt from the causes which in the lapse of time weaken the effect of many treaties. They are concluded in a reciprocal interest, being for the neutralised state a very important condition of its existence, and for the guarantors a security against the territory of that state being made the scene of hostile military operations. They are therefore not subject to unilateral denunciation by either party, and the considerations which led to them are not of such a nature as to become obsolete. Even if at the time of their conclusion they were intended to provide against a danger apprehended from a particular power, still they cannot be ranked with those invidious precautions which a great state usually

demands to be relieved from after a certain time, such as a stipulation that it shall not fortify some point in its own territory, since they equally take effect against other powers from which danger may afterwards arise. Such treaties are therefore to be regarded as a part of the permanent system of Europe, only liable to be affected by one of those great revolutions which disturb that system at long intervals. And it is probably this character of permanence which has led to their being sometimes erroneously regarded as restrictions of the sovereignty of the neutralised states.

What has been said in this section does not apply to the neutrality of the late Congo State, which was not imposed on it, and was not guaranteed by any power. By Art. 10 of the Final Act of the African Conference at Berlin the signatory parties only bind themselves to respect the neutrality of "the countries placed under the free trade system, so long as the powers" which enjoy any sovereignty or protectorate in those countries, "using their option of proclaiming themselves neutral, shall fulfil the duties which neutrality requires." In the conventional free trade zone so referred to there were comprised not only the Congo State, but possessions of England, Germany, Portugal and France. And since it was foreseen that those states, being at war, might hesitate to avail themselves of the proffered neutrality for their possessions in the free trade zone, the signatories by Art. 11 "bind themselves to lend their good offices" for the establishment of the neutrality. On its side the Congo State, by its circular of 1st August 1885, "declares that it shall be perpetually neutral, and that it claims the advantages guaranteed by Chapter 3 of" the Berlin Act, "at the same time assuming the duties which neutrality carries with it." Thus that state stood on the same footing as any other power, only with a unilateral declaration of perpetual neutrality for its territory, which the other powers engaged themselves to respect so long as the Congo State maintained it in fact. Now that the Congo State has become merged in Belgium, it seems open to the latter country to claim the benefit of the Berlin Act for its new territory, on the same terms on which it was enjoyed by its predecessor. A declaration of permanent neutrality, not made in acceptance of an offer by other powers such as that contained

in the Berlin Act, but solely emanating from the state which desired to assume the position, would not create any obligation on the part of other states, and might be withdrawn at pleasure, only with such notice as might be required by a due regard for the expectations which it might have occasioned.

Personal, Real and Incorporate Unions of States: Federations and Federal States.

We have now to consider certain phases through which states of international law may pass, usually in the course of an advance towards amalgamation with one another. That goal is reached when two states have ceased not only to have distinct relations with the outside world but even to be supreme over their respective subjects, as England and Scotland were united under the name of Great Britain, and afterwards that whole was united with Ireland in the new whole called the United Kingdom, each of those wholes being a state under a single supreme government at home as well as having a single set of foreign relations. This is called an incorporate union, and has to be mentioned here only for the purpose of observing that the component parts are thereby taken out of international law.

In the case of monarchies an observation of converse form, but for our purpose of similar tendency, has to be made about what is often the first stage in the advance towards amalgamation. Suppose two monarchical states with which by their respective constitutions their sovereigns are so identified that international engagements made by or with those states are expressed as being made by or with the sovereigns, as for the United Kingdom it is the King that is the party to treaties. Suppose also that one head wears both crowns, as happened in Great Britain and Hanover from 1714 to 1837, but that, as also happened in that instance, the foreign relations of the two states are kept distinct, the common sovereign habitually taking international action for them separately, so that it is even possible for the one state to be at war while the other is at peace. And

further suppose that the rules of succession in the two states, of which third powers are cognisant because they have had to take notice of them in recognising the descent of the crowns on the same head, may threaten to separate them again, as was always threatened by the exclusion of females in Hanover and not in Great Britain. In the case thus supposed there is said to be a personal union between the two states though in truth there is no union between them, and it must be observed that, as in the case of an incorporate union, no doctrine of international law is concerned, the separate existence of the states in the one case not having begun to be overshadowed, and in the other case having entirely ceased. A living example of personal union was lately furnished by the kingdom of Belgium and the Congo State, of which the king of the Belgians was the sovereign. A republic, of which the international engagements are made in its name and not in that of its chief magistrate, is incapable of such a seeming union with any other state, as it cannot avoid remaining distinct on the face of every transaction. In the case of a personal union of monarchies the subjects of the two crowns are distinct in theory and may be distinct in fact. It is true that during the time that the sovereign of Hanover, at first elector and afterwards king, was king of England, it was held that the personal character of allegiance prevented Hanoverians from being aliens in England and Englishmen from being aliens in Hanover, though on the separation of the crowns the Hanoverians at once became aliens in England[1]. But this only affected the conditions for acquiring in each respective country the internationally distinct character of its subject.

From the mere semblance of union just discussed a step in advance may be taken in either or both of two ways. The rules of succession in the two monarchies may be assimilated to one another, so as to exclude the chance of the crowns being separated by their operation. This was done for Austria and Hungary by the Pragmatic Sanction of 1723, which provided for the succession of Maria Theresa in both countries in accordance with the Hungarian rule, while enacting the Austrian exclusion of females as the rule in both countries

[1] *Isaacson v. Durant*, 17 Q. B. D. 54.

thereafter. The situation so created was described by Sir Travers Twiss as a permanent personal union, but has been more generally called a real union. Or the common sovereign, instead of habitually taking international action for his countries separately, may habitually unite them in his international action, so that the one being at war while the other is at peace becomes a contingency which, though theoretically possible, is not dreamed of in practical politics so long as the crowns continue to rest on the same head. It was in this way that the Hapsburg sovereigns acted for Austria and Hungary even before the date of the Pragmatic Sanction; and such a condition of things, if the classifications of international law are to be based on facts, would seem to have as good a claim to be regarded as a distinct stage in the process of unification as that which is constituted by securing the permanence of personal union. But we are not aware that any writer has described the union of Austria and Hungary before the Pragmatic Sanction otherwise than as personal.

A further step is made in advance when by the terms of their union two countries, and this time either monarchies or republics, are amalgamated for foreign affairs, so that they form constitutionally as well as *de facto* a single state of international law, by and with which all international engagements are made, although internally each remains a state supreme over its own subjects. This is a real union, properly so called, and in its international effects it is not different from an incorporate union, at least so long as no attempt is made to disturb it. It has been since 1867 the case of the empire of Austria and the kingdom of Hungary, which, though remaining for most purposes distinct, have common ministries of foreign affairs, war, and finance, and of which the international engagements are made by and with the emperor-king, so that to foreign countries they are only known as the one state of Austria-Hungary. Another case falling within the description of real union here given was that of Sweden and Norway, which had indeed fewer points of contact with one another than Austria and Hungary now have, but of both which by the terms of their union the same person had always to be king, and he conducted their foreign affairs.

Before going further it will be well to point out that in speaking of *engagements* made *by and with* a single state we have, advisedly, not mentioned *arrangements* made *for* a single state. It would not in our opinion impair the real union of Austria and Hungary if those countries should cease to be joined as they now are in a customs union, and the emperor-king should conclude different commercial treaties for them. Nor do we regard it as sufficient to prevent the late union of Sweden and Norway from being properly described as real that Norway had a different commercial flag from that of Sweden from the beginning, and a different military flag from 1844. The British colonies have not become states of international law because reciprocity treaties with the United States are sometimes concluded by the sovereign of the United Kingdom for American possessions, or because Australia has been granted a separate flag. Nor was Prussia the less an international unit because in 1815 she became a member of the Germanic Confederation for a part only of her dominions.

Such unions as we consider to be properly described by the name of real are the last stage possible, but by no means a necessary one, before the states concerned in them, sinking their separate internal existence, form an incorporate union; and it may be interesting to trace the stages through which England and Scotland passed to that consummation. When in 1603, on the death of Elizabeth, who was at war with Spain, the crown of England descended on James the Sixth of Scotland, who in that character was at peace with Spain, an instructive instance of the simplest personal union was presented. James received the Count d'Aremberg, sent by the archdukes Ferdinand and Isabella, the Spanish regents of the Netherlands, as the envoy of a friendly power, but peace between England and Spain was only concluded in 1604. The foreign relations of the two states having been assimilated by that peace, and being thenceforward practically carried on as those of a single state, and the rules of succession to the two crowns being also similar, the international position of the countries became that which belonged to the Hapsburg dominions between the Pragmatic Sanction and the troubles which ended in the arrangement of 1867. But when the Scotch parliament declined to settle the

crown on the house of Hanover in succession to Anne, as the English parliament had done, the permanence of the union of the crowns was threatened, and yet the two countries continued to be presented to the world in negotiation as one, which was just the position of the Hapsburg dominions before the Pragmatic Sanction. And then, by the statute of Anne, the incorporate union of England and Scotland was effected without their having passed through any stage corresponding to the present condition of Austria-Hungary or the late condition of Sweden and Norway.

It is sometimes difficult to determine whether the union between two or more states is incorporate or only real, that is, whether they continue to exist as separate states for domestic purposes. The United States of America present an example of incorporate union disputed in their civil war, but probably not again to be questioned. The right nomenclature to be applied to the case of Sweden and Norway was the subject of a wide range of opinion, Wheaton and Phillimore calling their union personal, while Klüber, Heffter, Bluntschli, Holtzendorff and Rivier called it real. Twiss regarded it as federal; and Hall, who says that real and federal unions are not distinguishable for international purposes, compared the power of the Swedo-Norwegian king with that of the federal government of the United States[1]. It is indeed true that between real and federal unions the difference is not in the closeness of the international connection existing between the states united but in the origin of that connection, the term "federal" being used to denote that a treaty is the origin of a connection identical in its international aspect with that which would be unhesitatingly called real if it arose from succession to a throne or from internal constitutional change. But a treaty tie between states admits of modifications of form, especially of some surrender of their internal distinctness, some approximation towards an incorporate union, which could not arise from the mere descent of different crowns on one head, even when the permanence of the union of the crowns is secured. And in the international aspect a treaty tie between states may be so close as to set up a federal state, in German *bundesstaat*, in which case it is pretty

[1] § 4, pp. 27, 28.

certain that there will be some surrender of their internal distinctness, or it may be limited to forming a federation of states, in German *staatenbund*. The former term is appropriate when the union, though not incorporate—for if it were so the federal stage would have been left behind—is real, only a single state being presented to foreign recognition and relations. The latter term is appropriate when the states which compose the federation are not interdicted from all foreign relations, although those allowed to them may be so insignificant that a more correct idea of the working of the arrangement would be given by calling the whole a federal state. Such are the cases of Switzerland under its present constitution and of the present German empire; but the German Confederation which existed from 1815 to 1866 was of a loose kind, the international importance of Austria, Prussia and the other states comprised in it vastly outweighing that of the federal body. In the United States of America the thirteen original states first drew together in a way which was truly federal, but their present union is incorporate and only called federal by way of reminiscence, just as the component states are called states only by way of reminiscence: it is not even federal in the sense of having been brought about by treaty, for it was brought about by the concurrent action of the states in adopting the constitution of 1787.

In all the cases which we have been considering the practical international question is whether, on an attempt being made to break up an existing union against the will of the government which represents it to foreign states, the part making the attempt can claim immediate recognition as a state always known to the outside world and only resuming an interrupted career of separate international action, or whether it must first make good its claim by attaining the measure of success which would be a necessary condition for the recognition of a new state erected by insurgents. There can be little doubt but that the latter will be the true answer, whether the union which it is attempted to break up be correctly described as personal, real, incorporate, or federal. The certainty of international relations, which is so important to peace, appears to demand that account shall be taken only of those relations which had an active existence when the difficulty arose, and

not of others which were in abeyance or obsolete. And the view here taken may be considered to have received international approbation by the fact that no power recognised the attempted separation of Hungary from Austria in 1849, or that of the confederated states from the United States of America in 1861. This being so, the space which some writers devote to the distinctions between the different kinds of union between states, disproportioned as it is to their international importance, is probably due to the belief in a science of public law of which international law is supposed to be a branch. In England we are more disposed to think that public law is a matter depending in each country on its national constitution, and that international law stands by itself. Nor with our meaning of "law" could we well think otherwise, for state societies and the international society are the only ones which adopt and enforce rules, and any points of agreement which might be picked out from a number of state constitutions, however scientifically arranged and discussed, could not be a system of law in any proper sense. But a knowledge of the terms on which the different unions of states exist is very important for politicians and diplomatists: those terms, and the sentiments which the populations concerned entertain with regard to them, are among the leading facts of the world in which statecraft has to move and act.

The Position of the Pope.

In discussing the classification of European states it is necessary to mention the position of the pope, because it is often misunderstood. Until 1870 he was the sovereign of a state. In that year the kingdom of Italy annexed Rome and the surrounding territory which still remained to him, but by a law of the kingdom, called the Law of Guarantees and passed on 13 May 1871, it gave him the necessary safeguards for the free exercise of his spiritual power. Those safeguards, in a summary description of them, had been promised in a circular despatch addressed on 18 October 1870 by the Minister of Foreign Affairs, the Marquis Visconti Venosta, to the Italian representatives at the different courts. But no steps were

taken by the powers with a view to get that promise embodied in an international engagement, and the general acquiescence with which the situation regulated by the Law of Guarantees has met must be taken as an acknowledgment that the promise was duly fulfilled by it. The pope therefore has now no international position; none as a sovereign—for by the loss of his territory he has ceased to be one—and none as the subject-matter of an international contract, for there is no such contract relating to him. His spiritual importance as the head of the Roman Church has not been diminished, perhaps has been increased, by the change; and those who see him still occupying a great position sometimes fall into the error of supposing that it still combines in some way the two grounds, temporal and spiritual, on which it formerly rested. It may be admitted that the Law of Guarantees possesses an interest for the world beyond that of an ordinary national statute, that it expresses the *modus vivendi* which Italy not only offers to a far-reaching moral force but carries out on her part, notwithstanding that the popes have not accepted it, and that foreign powers may conceivably show as much concern for its maintenance or its alteration as they have shown on different occasions about the terms of union between the states of Germany or the cantons of Switzerland. And those who reckon personal and real unions and federal constitutions as belonging to a science of public law may treat the position of the pope as a part of the public law of Europe; but it does not belong to international law.

The principal provisions of the Law of Guarantees are as follows. The pope's person is inviolable. He enjoys in Italy the honours belonging to sovereigns and the precedence which is allowed him by Catholic sovereigns, so that he would take precedence of the king if they happened to meet. For his person and palaces he may keep the number of guards previously usual, and no official of the state may enter either his palaces or his actual residence without his permission. Absolute personal immunities are enacted for the members of an œcumenical council, and for the cardinals during a vacancy of the papal throne. Protection is given to papal officers engaged in Rome in publishing the acts of the spiritual power, and to the books and papers of papal offices and congregations of an exclusively spiritual

character. Every foreigner invested in Rome with a spiritual office enjoys all the personal guarantees which the laws of the kingdom secure to its subjects. All Catholic institutions for the education of the clergy in Rome and the six suburbicarian dioceses depend exclusively on the holy see, and are exempt from interference by the educational authorities of the state. The pope's correspondence with the bishops and the Catholic world is free, and he may have his own post and telegraph offices at the Vatican and his other residences. The representatives accredited to him by foreign governments and those sent by him to them enjoy the privileges of diplomatic agents. He has the free use of the Vatican and Lateran palaces and of the villa of Castel Gandolfo, with their grounds and collections, but without power of alienation. And a sum of 3,225,000 lire, or £129,000, being the amount which was previously devoted in the Roman budget to the expenses which he now has to support, is annually placed by the kingdom to his credit, but the popes thus far have not availed themselves of it.

The position thus made for the pope comprises, along with much else, the exterritoriality enjoyed by a crowned head who visits a foreign country, but it is not a continuance of his sovereignty, nor, in spite of the assertion made by the Cardinal Secretary of State Jacobini in his circular of 11 September 1883, do the powers which receive his legates and nuncios and allow them their accustomed diplomatic rank thereby acknowledge him as a sovereign. That rank was never regarded as a consequence of the pope's temporal power but of his headship of the Catholic Church, to which the larger part of the business which his representatives had to transact always related, and it remains on the old footing, as does the ecclesiastical business. The pope is without either territory or subjects, for his palaces have not been excepted from the Italian conquest and he is allowed only limited rights in them, and his guards and officers are not his subjects. On the other hand he has not himself been declared an Italian subject, and the privileges which he enjoys are inconsistent with personal subjection. His position therefore is quite abnormal, but then, as Geffcken remarks, the papacy is a unique phenomenon in history[1].

[1] In 2 *Holtzendorff* 182. The piece here referred to is a valuable one.

States of European Civilisation and Others.

The international society which develops international law by its controlling opinion, enforces it by the irregular methods at its disposal, and receives or claims to receive its full application to all its members, is composed of all the states of European blood, that is of all the European and American states except Turkey, and of Japan. Outside Europe and America there are or were three Christian states to the dealings with which international law would be considered to apply, though they can hardly be ranked as contributing to its development or enforcement—Abyssinia, backward in civilisation, the little republic of Liberia, and the late Congo State, which might have been reckoned as Christian in respect of its sovereign being the king of the Belgians though its population was African and heathen.

Beyond the above limits the international society exercises the right of admitting states to parts of its law without admitting them to the whole of it. Such is the case with Morocco, Turkey, Muscat, Persia, Siam and China. The European and American states maintain diplomatic intercourse and conclude treaties with them, they regard their territories as being held by titles of the same kind as those by which they hold their own, and when at war with them they regard the laws of war as being reciprocally binding just as between themselves. But the civilisation of those countries differs from that of the Christian world in such important particulars, especially in the family relations and in the criminal law and its administration, that it is deemed necessary for Europeans and Americans among them to be protected by the enjoyment of a more or less separate system of law under their consuls. These consular systems are established by treaties concluded with the territorial powers, which possess civilisations of their own sufficiently complex to enable them to appreciate the necessity, and their maintenance as well as their establishment must depend to a considerable extent on the concurrence of those powers. For the few guards and officers of which the consuls dispose, and even the influence derived from the foreign forces which stand at their back, would

be unable to maintain the regular working of such systems if the territorial authority did not on all ordinary occasions uphold order and protect each class of inhabitants in the enjoyment of the legal system allowed it. Failing that, the position of foreigners would be so untenable that either their conquest of the country in question or the termination of their residence in it would soon follow. Japan has recently been raised from this class of states to the full community of international law, the consular jurisdiction there having been given up in pursuance of treaties which the European and American powers concluded with that empire, and which came into force in 1899.

States and their Dependencies: the British Colonies and the Native States of India.

The colonial and other dependencies of a state are not in personal union with it, although if the government is monarchical the same person is the sovereign of both, for the constitutional tie between them is indissoluble. Neither are they in real union with the parent or supreme state, because they do not stand side by side with it as equals, and this whether the authority exercised over them be as absolute as that of the United Kingdom over Gibraltar, or as attenuated as that of the United Kingdom over Australia. Nor again are they in incorporate union with the parent or supreme state, because they are not amalgamated with it for internal purposes, although for international purposes they form one whole with it. They form with it one dominion or set of dominions, represented abroad by the parent or supreme state.

In the case of the great British dependency, India, the relation is a little complicated by the fact that not the whole of it has been made a British dominion, many native states being allowed to exist in it under an undefined British supremacy. To speak accurately of such a case we want two words to express the two meanings of empire in English, one meaning, translatable in German by *reich*, being the total of the dominions of a given sovereign or state, the other, translatable in German

by *gebiet*, including the whole extent of territory in which he or it exercises power. In the former sense what is called British India is alone a part of the empire, in the latter the native states are included in it. The position of these is defined by two declarations carrying the highest authority. On the external side, the preamble of the Act of Parliament (1876) which applies to them the British Indian legislation against the slave trade, st. 39 and 40 Vict., c. 46, says:

"And whereas the several princes and states of India in alliance with Her Majesty have no connections, engagements or communications with foreign powers, and the subjects of such princes and states are, when residing or being in the places hereinafter referred to, entitled to the protection of the British government, and receive such protection equally with the subjects of Her Majesty."

On the internal side, that is the relation of the native states to the British power, the government of India published the following notification in its official Gazette, No. 1700 E, 21 August 1891:

"The principles of international law have no bearing upon the relations between the government of India as representing the queen-empress on the one hand, and the native states under the suzerainty of Her Majesty on the other. The paramount supremacy of the former presupposes and implies the subordination of the latter."

Thus India is a world of itself. Not only is the action of all foreign states excluded from every part of it, but those parts which are not included in the dominions of the king-emperor are subject to a suzerainty, paramouncy or supremacy possessed by him, to which nothing parallel exists in the relations of states of international law. The relations between any two or more of the latter are to be found in the public documents which establish them, and we have seen that no doubtful points are decided in favour of a suzerain by the mere force of that name. In India on the other hand the paramount power and the correlative subordination are left without definition, and it is taught that the treaties and grants held by the protected princes, and the precedents of our dealings with them and with the protected princes who hold no treaties or grants, must be read as a whole, so that the principles most recently laid down are to

be applied to all, and those relating to any department of conduct, as military affairs or the duties of humanity, are to be ascertained for all from the document in which that department is most fully worked out for any one[1]. Hence the empire of India, as a term of state law, must be understood in the widest sense. It comprises the whole peninsula and is indissolubly connected with the United Kingdom, the British parliament of king, lords, and commons having the ultimate authority over it.

[1] Sir W. Lee-Warner, *The Protected Princes of India*, pp. 37—40.

CHAPTER IV.

THE ORIGIN, CONTINUITY, AND EXTINCTION OF STATES.

The State System as a Growing Body.

It has been said that "the marks of an independent state are that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control[1]." This is true, and it is important when there is a question of admitting a state as a new member of the international society, but there are old members of that society which do indeed possess those marks but do not owe their introduction to any test or qualification. They are or represent the founders of the civilised state system, and stand in it by virtue of a history reaching further back than the rules of that system.

The actual state system of the civilised world dates from the Peace of Westphalia, which closed the Thirty Years' War in 1648. The intercourse between most European states had previously been intermittent, but the multitude of representatives assembled at the congress which concluded that peace was in itself an affirmation of the existence of a body of states whose interests, whether agreeing or clashing, did not permit them to be strangers to one another, and ever since then it has been the practice for every state belonging to the system to be permanently represented at the capitals of the other

[1] Hall, § 1.

states by resident ambassadors or ministers of inferior rank. The principle of accepting accomplished facts as the ground of international relations was exemplified in a striking manner by the recognition of the independence of the United Netherlands and Switzerland, and by the acknowledgment of the right of the princes and cities comprised within the Holy Roman Empire to contract diplomatic engagements with each other and with states outside the empire, subject only to the condition, which there were no means of enforcing, that their engagements should not be prejudicial to the empire or the emperor. The tendency to base international relations on general grounds of principle, so far as facts permit, was strongly promoted by the great number of the states which thus enjoyed unquestioned sovereignty, while many of them were so weak that there could be little safety for them if grounds of principle were abandoned. And it was established that the principles to be admitted were secular: the pope's claim to supreme temporal authority was obsolete, and now the Protestant states in Germany were firmly placed on an equal footing with the Catholic ones. The modern international society was thus founded, and the states which belonged to it in 1648, including those which continue their identity under different names and with varied limits, as Savoy became Sardinia and Sardinia Italy, may be called its original members. Since 1648, without reckoning the growing intercourse with states of various Oriental civilisations, new members have been added to the full international society by many different processes.

First must be mentioned the entrance of Russia into the great state system, an ancient Christian empire which in older times had been little in contact with Central and Western Europe. In those times she, together with Poland, Sweden, and Denmark, three original members of the great system, formed another system more or less similar to the great one. As a consequence of the reforms and the ambition of Peter the First she entered the great system through her own political action, and the two systems were fused.

Secondly, Japan illustrates another mode in which an ancient state may become a full member of the international society. She did not enter it, like Russia, by her own political action,

but through being freed by the European and American powers from the consular jurisdiction which was the badge of her imperfect membership.

Thirdly, a new member may be added to the international society by the erection of a state with European modes of government in a region previously uncivilised. Of this the most important example is that of the Congo State.

The international association of the Congo, founded by the king of the Belgians, acquired so solid a footing in a part of Central Africa that in 1884 and the beginning of 1885 it concluded treaties with the United States of America and numerous European powers, by which, among other things, the boundaries of its territory were agreed on with the powers having conterminous possessions. Its name and constitution were then changed to those of a state, with the king of the Belgians as its sovereign, and it was admitted to adhere to the General Act of the African Conference of Berlin. Another example is that of the republic of Liberia on the Guinea Coast, which has grown out of a settlement made in 1820 by the American Colonization Society with free negroes from the United States, and since 1847 has been recognised by the United States and the European powers as an independent state. Here we see European institutions, learnt on civilised soil by men of other blood and transported by them to another region of the earth, accepted as the equivalent of European blood.

Fourthly, a new member of the international society may arise by the voluntary subdivision of an old member, as when the king of Portugal, of which state Brazil was a possession, separated Brazil from the mother country and made himself its emperor, abdicating the throne of Portugal. Brazil has since become a republic.

Fifthly, the new member may be a new state erected by one of those arrangements which the great powers make in their ill defined character of the representatives of Europe. The occasion for such creations is the struggle of a people for independence, and usually only one or two of the powers come in the first instance to the aid of the struggling people, but ultimately they all agree in sanctioning the result as a matter of European arrangement. Thus Belgium was carved out of

the Netherlands, England and France being the first to take up the cause of the Belgian insurgents in 1830, but the other powers assisting in the conferences and negotiations which followed until the new order was accepted by all of them, and finally by the Netherlands in 1839. Thus also Rumania and Servia have been carved out of Turkey, Russia having been the prime mover in their emancipation, but the successive stages of the result being consecrated by the congresses of Paris in 1856 and Berlin in 1878. In cases of this class the powers which are concerned in the formal erection of the new state are able to impose conditions on it, as that of permanent neutrality was imposed on Belgium, and on Rumania and Servia that of religious toleration, which Rumania has practically set at nought. Religious toleration was also imposed at Berlin on Montenegro, a state which had been previously recognised as independent by all the great powers except England and Turkey, but which, by the more secure position and the extension of territory given to it by the congress, partook of the nature of states erected by European arrangement.

Sixthly, the new member may have separated itself from some state of the international society, and its independence may have been recognised by the state from which it separated and by others, one by one as they found it desirable to aid in its insurrection or to enter into diplomatic intercourse with it, without there being anything in the nature of a collective recognition or general arrangement. This was the case of the United States of America and of the Spanish American republics, and those of Greece and Bulgaria may be classed under this head.

Seventhly, the admission of Turkey to the European state system requires particular mention. As we have seen, it has not even yet been a complete admission to the international society, but, such as it is, it was made formally by the treaty of Paris in 1856. By the seventh article of that treaty the sovereigns of England, Austria, France, Prussia, Russia and Sardinia "declare the Sublime Porte admitted to participate in the advantages of the public law and system of Europe. Their Majesties engage, each on his part, to respect the independence and the territorial integrity of the Ottoman empire, guarantee in common the strict observance of that engagement, and will in consequence

consider any act tending to its violation as a question of general interest." The advantages of the public law and system of Europe are not in this to be taken as all those of international law; that interpretation would be conclusively negatived by the fact that the consular jurisdiction in Turkey was maintained. The word "system," which in the English official version replaces and indeed accurately translates the word *concert* of the French text, is a well known term of diplomacy for a group of states bound together by some tie of common policy; and what common policy was here intended appears from the engagement to consider any act tending to violate the independence or territorial integrity of the Ottoman empire as a question of general interest. Russia and Austria had, from the seventeenth century, been left to settle their differences with Turkey and to encroach on her with only occasional interference by any of the other Christian powers. The principle which since the Peace of Westphalia had governed the international politics of central and western Europe, and after the admission of Russia the relations of the other Christian powers with her also, namely that any alteration of the map is a matter of legitimate interest even to the remotest member of the state system, had not been extended to Turkey, but was now to be so. The effect of that extension was seen when the powers regarded themselves as entitled to require the treaty concluded by Russia with Turkey at San Stefano to be submitted for revision to the congress of Berlin. As to the independence and territorial integrity of the Ottoman empire, they would stand after the settlement at Paris on the same level as the respect which the Christian powers profess to feel for the independence and territorial integrity of one another, except so far as the clause by which the Christian sovereigns guaranteed in common the strict observance of that respect would have placed it on a higher level. But that clause must be considered as obsolete since the events of 1877 and 1878, which amounted to one of those revolutionary changes of circumstance by which guarantees, concluded as they always are with reference to a certain state of things, are swept away[1].

[1] This is also the opinion of Professor Holland: *The European Concert in the Eastern Question*, p. 245.

The form of recognising a new member of the international society is usually the *de facto* one of entering into diplomatic intercourse with it by mutually accrediting and receiving diplomatic agents, or by signing with it a treaty like that by which France came to the assistance of the United States in 1778, or a public Act like the General Act of the African Conference of Berlin, by permitting its adhesion to which the Congo State was recognised even by those of the signatories which had not previously concluded treaties with it. In the case of Rumania and Servia, where states were created by congresses at which they were not present and the treaties resulting from which they were not called on to sign, what was done at the congresses merely amounted to putting on record the will of Europe as represented by the great powers, and obtaining the consent of Turkey to her dismemberment. The actual recognition of the new states had to follow by accrediting diplomatic agents to them, and the different powers delayed to accredit any to Rumania till they received such proof as they respectively deemed sufficient of her willingness to fulfil the condition of religious toleration.

In no case does the new state make to the recognising states an express declaration of its intention to be bound by the rules or principles of international law. Those therefore who lay it down that it is only by virtue of its consent to international law that a state is bound by it, are obliged to infer that consent from incidents in which we may be sure that nothing of the kind was thought of when they occurred. Practically the obligation is always assumed to exist, and it is therefore more reasonable to enquire what is its source than to strain inferences in order to prove that it has been admitted. The source is in our judgment not far to seek. The new state cannot, if it would, stand isolated, and since it shares the benefits of living in a society with other states it must accept the laws of that society. The action of a state is the action of the men who compose or govern it, and there is not in natural justice a right for men to sink their individual responsibilities by forming associations at their free pleasure. The right of association can only exist when fenced by such regulations as the society in which it is enjoyed finds to be necessary for its protection, and

international law is the body of regulations by which the society of states fences the right of men, living in inevitably close contact with one another, to associate themselves in states.

The only other point to be mentioned in connection with the admission of new states in general is that the recognising powers must respectively be satisfied that the new state gives sufficient promise of stability in its government. No power would willingly try to weave ties with a rope of sand.

The Recognition of the Belligerency of Insurgents.

We have now to consider more particularly the mode of origin of a new state which has been noticed above in the sixth place, separation by insurrection from some state of the international society. In that case a stage is often interposed before the recognition of the insurgent body as a new state, namely its recognition as a belligerent, that is the recognition that between the insurgent body and the old government a war is proceeding during which the interests of foreign states and their subjects affected by it must be dealt with on the same footing as those of neutrals in a war between recognised states. In the beginning of any insurrection the subjects of foreign states may suffer loss or inconvenience, and it may be necessary for those states to make representations on their behalf to the recognised government of the country in which the struggle takes place, but they must do so as to a government with which they are in amity, and with due consideration for the practical difficulties with which it may have to contend. If the insurrection acquires consistency, then, since the subjects of foreign states and their property requiring protection may be found within the lines of the insurgents as well as within those of the government forces, it may be necessary for those states to have some kind of communication with the authorities among the insurgents. Thus the foreign consuls in the Confederate States, nominated before the outbreak of the American civil war, continued to exercise their functions during its progress; and England nominated consuls to the various South American

republics eighteen months before the earliest recognition of any of them as a state[1]. Such proceedings are measures of business, quite distinct from political recognition, and if the insurgent authorities impede the exercise of consular functions in the hope of hastening political recognition they have only to blame themselves for any inconvenience which they or their cause may suffer in consequence. Beyond this the duty which normally lies on foreign states not to intervene in the internal dissensions of a friendly state makes it their normal duty not to go without necessity, and that principle applies equally to recognition of belligerency and recognition as a state, though the necessity may arise earlier for the one than for the other.

Taking first a recognition of belligerency, we must observe that although we have been led to speak of it by the case of an insurrection aiming at separation, what has to be said on it applies equally to the case of an insurrection aiming at a change of government in a state from which it is not desired to separate. The normal justification of a recognition of belligerency requires that there shall be a real war, that is a contest carried on with the dimensions and by the methods of war and not by the methods of savagery, and further that the recognising state shall have been brought into contact with that war, that is that it shall be under the necessity of taking some line of action involving either its recognition or its non-recognition. Otherwise the recognition would be gratuitous, therefore offensive to the old government, and sure to be represented by it as aiding the insurgents by its moral effect.

The Hungarian rising of 1849 was a real war, but carried on by land only, so that only countries with conterminous frontiers could naturally be in contact with it. Russia intervened in favour of Austria, and a counter-intervention by other powers might thereby have been justified, but England or France would not have been justified on general grounds in declaring Hungary to be a belligerent, and they did not do so. Where there is a conterminous frontier a foreign state will seldom fail to be under the necessity of taking some line involving either the recognition or the non-recognition of belligerency. The recog-

[1] Hall, § 105, p. 336.

nition would mean that neither party should be allowed to make the foreign territory a base of operations, and that the forces of either party crossing the frontier should be disarmed and interned. The non-recognition would mean that the old government, as a friend harassed by disorder, might make the territory a base of operations but the insurgents not, and that insurgents crossing the frontier should be disarmed and interned but not necessarily government forces. Thus Austria and Prussia are driven to choose in case of an insurrection in Russian Poland, and France is driven to choose in case of an insurrection in Spain. When the war is carried on by sea all maritime powers are continually placed under a similar necessity of choosing, by the very action which they take, whether or not they will recognise the insurgents as belligerents. If the insurgents bring prizes into their ports, recognition will mean that the lawfulness of the captures must not be disputed, but that the captors must submit to the regulations made by the foreign state in question as to such use of its ports, while non-recognition will mean that the prizes may be taken from the captors and restored as the proceeds of robbery. And neutral ships and goods may be affected by either of the contending parties in the various ways in which they are liable to be affected under the laws of war. If again the old government tries to elude the laws of war by closing to commerce, as an act of domestic sovereignty, ports not in its power but occupied by insurgents, the submission of foreign states to such closure will be a refusal to recognise the belligerency, and their refusal to submit to it will be a recognition of the belligerency. "In 1861, New Granada being in a state of civil war, its government announced that certain ports would be closed, not by blockade but by order.....Lord John Russell [British Foreign Secretary], speaking upon the subject, said 'that it was perfectly competent to the government of a country in a state of tranquillity to say which ports should be open to trade and which should be closed. But in the event of insurrection or civil war in that country, it was not competent for its government to close ports which were *de facto* in the hands of the insurgents, and that such a proceeding would be an evasion of the international law relating to blockade[1].'" In

[1] Hall, § 5, p. 37, quoting Hansard, clxiii, 1646.

1885 Mr Bayard, Secretary of State of the United States, similarly refused to acknowledge the closure of certain ports in the possession of insurgents, which had been declared by Colombia, that is New Granada under a changed name[1].

If when one course or the other must be taken, whether in an exclusively land war or in one waged also at sea, the choice made is in favour of recognising belligerency, and the recognising power gives the insurgents no more aid than that which they indirectly derive from such recognition, it cannot be accused of intervention in any sense in which that term carries condemnation, and the old government is not entitled to take offence. That government, besides its chance of sharing in the indirect benefit, will at least be relieved from all doubt as to its responsibility for the acts of the insurgents. If the choice had been made against the recognition of belligerency, the old government would probably on the whole have derived the greatest indirect benefit but would not have said that there was an intervention, though that name would have been better deserved than in the opposite case, because the foreign state would have shut its eyes to the fact of there being a real war and have treated combatants as rioters or pirates. The truth is that in the circumstances supposed the normal duty of non-intervention in the internal dissensions of foreign countries dictates neither the one choice nor the other, because each has the practical effect of intervention even though not intended as such, and the foreign state is free, so far as that duty is concerned, to consult its own interest and the general political good of the world.

In some cases the government against which the insurrection is directed relieves other powers from the necessity of choice by dealing on the footing of war with some part of the situation which affects those powers. This happened when in 1861 the coast of the Confederate States was declared by the United States to be closed to commerce, not only by a domestic order as in the cases of New Granada or Colombia quoted above, but by a regular blockade. "I, Abraham Lincoln, president of the United States," said the proclamation of 19 April 1861, "have deemed it advisable to set on foot a blockade of the ports

[1] Hall, *loc. cit.*

within the states aforesaid in pursuance of the laws of the United States and of the law of nations in such case provided." After this the maritime powers of the world had no alternative but to submit to a war measure taken in the prosecution of a war otherwise notorious, and they did so, but the inevitable consequence was that the Confederate States, whose belligerency was thus recognised by their opponents, became entitled to the whole range of the powers enjoyed by a belligerent in maritime war. The British proclamation of neutrality was dated on 13 May, and would perhaps have been justified even without President Lincoln's proclamation by one which the president of the Confederate States had issued on 17 April inviting applications for letters of marque and reprisal, under which an immediate commencement of maritime war might be expected.

We have said that, so far as the duty of non-intervention is concerned, a foreign state is free to consult its own interest and the general political good of the world in deciding whether to recognise as war an insurrection which is really war and touches it. It remains to be considered whether in such a case a foreign state is not bound by a duty of another kind to recognise the belligerency of the insurgents. Vattel and Bluntschli hold that civil contests in which each party acts as a state must be treated as wars between independent states, and although their arguments are drawn from the ferocity which would be introduced into such contests if prisoners were executed as rebels, their language leaves no doubt that they did not intend to restrict their doctrine to the treatment which the opposing parties must extend to each other. Evidently they looked on the position of insurgents carrying on a real war as a question of public law, the answer to which must be one and the same for the international branch of public law, and therefore for foreign states, as for the domestic branch directly affecting the parties[1]. Rivier, on the contrary, holds foreign states to be quite free in their choice as to recognition of belligerency: *ils peuvent reconnaître aux insurgés le caractère de belligérants. S'ils le font, et seulement pour ceux qui le font,*

[1] Vattel, l. 3, c. 18, §§ 293–5; Bluntschli, § 512. See what has been said above about the continental view of public law, p. 37.

la guerre civile est assimilée à la guerre entre Etats[1]. Hall admits that it would be "inhuman for foreign states to capture and hang the crews of warships as pirates; humanity requires that the members of such a community [as we are considering] shall be treated as belligerents, and if so there must be a point at which they have a right to demand what confessedly must be granted....But the obligation...flows directly from the moral duty of human conduct, and in the case of foreign states from that also of not inflicting a penalty where there is no right to judge; it has nothing to do with international law. As a belligerent community is not in itself a legal person [does not this beg the question? J. W.], a society claiming only to be belligerent and not to have permanently established its independence can have no rights under that law[2]." Elsewhere Hall says that "theoretically a politically organised community enters as of right into the family of states, and must be treated according to law, as soon as it is able to show that it possesses the marks of a state[3]." His view therefore is that recognition of belligerency cannot be claimed as of right until recognition of independence can be so claimed, when the lesser claim will of course be included in the greater. As regards practice, in 1779 the Dano-Norwegian government delivered up to England some merchant vessels of which the United States squadron under Paul Jones had made prizes, and which had been sent into Norwegian ports. Compensation was demanded by the States, which argued that during a civil war a foreign state which does not take one side or the other "must allow to both the contending parties all the rights which public war gives to independent sovereigns." And "the claim against Denmark was kept alive by intermittent action until 1844, and does not appear to have been ever formally dropped[4]." We think it must be said that a right of insurgents to claim the recognition of their belligerency as distinct from the recognition of their independence has not yet become a legal one, either by

[1] T. 2, p. 213. [2] § 5, p. 34. [3] § 26, p. 87.

[4] Hall, § 5, p. 34. In 1806 and 1848 the United States congress passed Acts for paying their shares of the expected compensation to the captors or their representatives in advance, as being due to them from the government on account of its non-feasance: Lawrence's *Wheaton*, pp. 41, 42.

the consent of approved authorities or by custom, though much may be said for it on the ground of reason when even those who deny its legal character can represent the consequences which might follow from its refusal as being inhuman.

It has been said that some belligerent rights may be allowed to insurgents while refusing others, and an instance of a partial recognition of belligerency may be given in the conduct of the British government with regard to the rising of the congressional party in Chili against President Balmaceda in 1891. The insurgents had possession of certain ports, and though their strength was mainly in the fleet, which had taken their side, the substantial character of their movement, which was ultimately successful, cannot at any time have been doubted. They proclaimed a blockade of Valparaiso and Iquique, and the diplomatic representatives of Great Britain, Germany, France and the United States protested against it: Mr Kennedy to Lord Salisbury, 22 January 1891. But the Foreign Office, on 24 January, informed Messieurs Smith and Service, British shipowners, by telegraph that "assuming effective blockade to exist, escort through it cannot be given." The insurgents did not enforce their blockade against foreign vessels, but in February the British admiral Hotham recognised the right of the insurgents to capture foreign vessels for the carriage of contraband of war, and the representatives of the other powers seem to have acquiesced. Yet Great Britain declined to accept the Chilian government's repudiation of its responsibility for the acts of the insurgent fleet, and to put the Foreign Enlistment Act in force in British ports[1]. Of course the lawfulness of a partial recognition of belligerency, if admitted, will be a decisive argument against the existence of a legal duty to recognise belligerency.

The great degree in which a recognition of insurgent belligerency depends on the judgment of the recognising state, which must be passed at least as to the existence of a real war even if it should be held that there is no option where such existence is clear, makes it highly expedient that the

[1] Rev. Dr Lawrence on *Recognition of Belligerency considered in relation to Naval Warfare*, in the *Journal of the Royal United Service Institution* for January 1897, quoting British Parliamentary Papers, Chile, no. 1 (1892).

recognition should be made formally, as by a declaration of neutrality. Hall goes so far as to say that a formal notification of some kind must be issued[1], but this does not appear to be strictly necessary.

"Recognition of belligerency," says Hall, "when once it has been accorded, is irrevocable," on the ground of the new legal relations which it sets up as between the recognising state and third parties[2].

The Recognition of New States arising from Insurrection.

When insurgents aiming at separation have established a state occupying a certain tract of territory with supreme authority and a good prospect of permanence, the question of the recognition of the new state by foreign powers arises. They will find that intercourse with the local authorities, of a more regular and political kind than can be supplied by the expedients resorted to during the earlier stage of the insurrection, is necessary for their interest and that of those of their subjects residing in the territory or trading with it. The new authorities, in the position which they have achieved, will probably decline to tolerate irregular expedients any longer, and the old government, being dispossessed in that part of its territory, will be unable to supply the need. In these circumstances the case of necessity will have arisen which, by depriving the recognition of all gratuitous character, will take from the old government all reasonable ground for offence at it. It cannot be expected that foreign powers shall wait till the old government has itself made such recognition, or even till it has withdrawn from all armed contest if there is no reasonable chance of its success in that contest. When the United States and England recognised the Spanish American republics Spain still maintained small forces at a few points in her vast former possessions, but their recognition was not further postponed by England except in the case of one of them, and there only because of the internal instability of the new government.

What has been said of the acquisition of independence by

[1] § 5, p. 38. [2] § 5, p. 37.

insurrection will apply, *mutatis mutandis*, to the case of a semi-sovereign state shaking off its dependence on its superior. It has been said above that between two states so related to one another war is theoretically possible, and, if the movement is not made by individual insurgents but by the dependent state in its corporate organisation, there can be no more question about the recognition of its belligerency than there is when two independent states go to war with one another. In such a case a state of international law, though a semi-sovereign one, has made war, which it can do, however it may be under a contractual obligation not to do it. If the issue of the contest should be favourable to the once semi-sovereign state, the recognition by other states that it has achieved independence or full sovereignty will be subject to the same considerations as have been explained for the case of an ordinary insurrection aiming at separation.

Continuity of States through Changes of Government.

The government of a state is distinct from its person, it is only the agent of the state person, and according to modern views this is so even when the head of the government is a monarch in whose name treaties, declarations of war or neutrality, and other acts of international life are made. Consequently a state preserves its continuity, and its engagements and obligations towards other states, as well as theirs towards it, remain unaltered, notwithstanding a change of government even so radical as one from a monarchy to a republic or conversely. It is rather by an application of this principle than by an exception to it that if a monarch assumes a higher title, as if a grand-duke should take the title of king or a king that of emperor, he does not thereby raise himself in the scale of international precedence. The rank of a state is part of its relation to other states, and without their consent is not affected by a change of internal designation.

When a change of government is effected by violence, a reasonable time must be allowed to other states for judging of the stability of the new government, before accrediting ambassadors or other diplomatic agents to it or receiving them

from it. In this point the principle which is admitted as to recognising a new state applies equally to recognising a new government. Revolution might be followed by counter-revolution, new engagements prematurely contracted might be repudiated, and the continued existence of old engagements prematurely cancelled might be asserted. In the meantime necessary non-political business may be carried on, diplomatic representatives remaining at their posts or leaving them in the charge of agents of lower official rank. Even political business may be carried on through the stage of negotiation, though if the result of the negotiation were embodied in a treaty, exchange of notes, or other binding form, that would amount to a recognition of the new government, and such a step would not be taken until the foreign power was satisfied of its stability. Thus on the fall of the monarchy and the proclamation of a republic in France in 1792, the British embassy, though not accredited to the new government, was not at once withdrawn from Paris, and a French minister remained in London until he was dismissed upon the execution of the king, on which France declared war, breaking off the political negotiations which had been proceeding without a recognition of the republic.

Continuity of States through Changes of Territory.

When a province is ceded by one state to another, the continuity neither of the transferor state nor of the transferee is affected. The treaties of each normally remain in force, and will operate in future for and only for the respective territories as newly arranged, though the transfer may amount to so great a change of circumstances that a particular treaty, still applying in the letter, can be no longer regarded as applicable in fact. Thus it is conceivable that a state which had guaranteed, or joined in collectively guaranteeing, the neutrality or inviolability of another state, might be so reduced in strength by the loss of territory that the performance of its guarantee could no longer be fairly expected from it. On the same principle, when a state is extinguished and its territory incorporated with another state,

the continuity of the annexing state and the obligation of its treaties are unaffected, and the treaties of the extinguished state fall to the ground.

So far as the interests of individuals may be affected by a treaty of the transferee or annexing state on the one hand, or by one of the transferor or extinguished state on the other hand, since each is the treaty of the state and its consequences to individuals are only incidental, the population of the transferred or annexed territory will lose both the benefit and the burden of the treaties of the transferor or extinguished state, and will gain the benefit and come under the burden of those of the transferee or annexing state. Thus a treaty of 1760 between France and Sardinia, relative to the execution in either country of judgments rendered by the courts of law of the other country, is now operative in favour of the execution of French judgments throughout Italy, and in favour of that of the judgments of all Italian courts in France. Thus also "on the incorporation of the kingdom of Hanover in the Prussian monarchy, in 1866, the Hanoverian treaties of amity, commerce, navigation, extradition, and copyright ceased to exist. They were replaced by the Prussian treaties on the same subjects[1]." It is said that on the incorporation of Texas with the United States England and France hesitated to admit that their commercial treaties with the former had fallen to the ground[2]. If that is so, at least the objection, which may have been founded on a failure to perceive a true incorporation through the veil of a quasi-federal union, was not pressed; and on the annexation of Madagascar by France, both England and the United States admitted without difficulty that they could no longer claim the benefit of the Malagasy tariffs which had been arranged by conventions with them.

There is a class of treaties called transitory or dispositive which may seem to be an exception to the rule that the treaties of the transferor or extinguished state cease to operate in the ceded or annexed territory, but which may as easily be represented as not being really an exception. These are treaties which dispose of or about things by transferring or creating rights in or over them, as a deed conveying a field or granting

[1] 1 Rivier 73.

[2] See *United States Senate Documents*, 1st session of 29th congress, vol. 7, 1845–6, document No. 375.

a right of way over it disposes of or about the field by transferring the property in it to the purchaser or creating the right of way over it in the grantee. Such are treaties of cession, by which the sovereignty in a territory is transferred by one state to another, and those by which a territory is subjected to a servitude or easement, as the treaties of 1815 by which northern Savoy was declared perpetually neutral, thus creating in it a servitude of neutrality in support of the neutrality of Switzerland. Documents of title of this class, whether in private or in international law, are called transitory, because their effect passes over (*transit*) into and forms a part of the body of rights concerning the thing in question, so that it is possible in subsequent dealings to start from that body of rights as a fact, without being obliged always to refer to the dealings which created it, as it would be necessary to refer to an ordinary contract every time that its performance had to be claimed in a fresh case. But the term is a bad one, because the associations usually connected with the word "transitory" cause it to suggest a fleeting character for documents of which the operation is really the most permanent, and the best term to use is "dispositive." Now a transferee or annexing state takes the territory as it stands, that is, subject to all the rights which have been impressed on it in favour of third parties by the treaties which have disposed about it; and by virtue of this possibility of looking only at the rights as they stand, without going behind them to the documents of title, dispositive treaties may be represented as not being an exception to the general rule. Rivier says that "the successor can denounce the servitude, for treaties establishing servitudes must be ranged among those which, although dispositive, are considered as concluded *rebus sic stantibus*[1]." This however seems too wide a proposition. It would have to be shown that the interest of third parties which the servitude was intended to secure had ceased to exist in consequence of the change of sovereignty over the territory which it affected, and it would be difficult to show this in such a case as that of the Swiss, and European because Swiss, interest secured by the neutrality

[1] 1 Rivier 73.

of northern Savoy, which we must therefore hold to be obligatory on France as the successor in that region.

The principle that a transferred province is taken as it stands leads to the conclusion that it must continue to bear its provincial debt. The transfer does not change the security for that debt, nor would it be just that it should do so, the loan having presumably been contracted for provincial purposes. As to the general debt of the state which loses the province, the maxim *vae victis* has usually prevented the acquiring state from assuming a part of it proportioned to the resources of the transferred territory, and this has been justified on the ground that at the end of a war the financial relations between the states concerned are settled in fixing the amount of the indemnity exacted by the conqueror. There have however been some recent exceptions. In 1860, Italy, annexing a part of the Papal States, took on herself a part of the Papal debt, by an arrangement which was made with France because the pope declined to give any kind of sanction to the dismemberment of his territory; and in 1866 Prussia, on the annexation of Sleswick-Holstein, assumed a part of the debt of Denmark. The fundholders have no legal claim on the acquiring state beyond the part of the debt, if any, so assumed, unless their contract gave them a specific security on the revenues of the ceded province, or on state property in that province which passes by the cession. They must look to their debtor, whose continuous identity is neither extinguished nor shifted by the cession.

But as to the moral claim which may exist where a cession seriously cripples the ability of a state to meet its general debt, as well as the legal claim existing where the revenue of the ceded province or property passing by the cession has been given as security, it will be well to refer to the views expressed on behalf of the United States on the termination of the war between Chile and Peru, the latter ceding to the former territory rich in guano and nitrates. Mr Frelinghuysen, secretary of state, wrote to Mr Phelps, the United States minister in Peru, 25 August 1883: "It seems to be essential to a just and lasting peace either that Peru should be left in a condition to meet obligations towards other governments which were recognised prior to the

war[1], or which may be legitimately established, or that if Chile appropriates the natural resources of Peru as compensation for the expenses of the war, she should recognise the obligations which rest upon those resources, and take the property with a fair determination to meet all just incumbrances which rest upon it[2]." And again, on 29 December 1883: "The opinion of the United States heretofore has been that as the foreign obligations of Peru, incurred in good faith before the war, rested upon and were secured by the products of her guano deposits, Chile was under a moral obligation not to appropriate that security without recognising the lien existing thereon[3]." There was perhaps no necessity to qualify the obligation as moral, where the guano deposits had been pledged as security.

The Extinction of States.

A state may cease to exist either by voluntary arrangement or by conquest.

The constituted authorities of a state, whether its executive government or a body in the nature of a parliament, must be considered as having their various functions entrusted to them in order that they may be exercised in carrying on the state as it exists and not in extinguishing it or fundamentally altering its character; and it is therefore impossible that the extinction of a state, or even its union with another state on terms involving the loss of its separate existence as a state of international law, can ever be effected by voluntary arrangement in a constitutional manner. This is so, even when the extinction or union is voted by a parliament which for all purposes comprised in carrying on the state as it exists is regarded as omnipotent. The extinction or union may however have a moral sanction from the approval

[1] This allusion is perhaps explained by the following: "In treaty of peace between Chile and Peru provision must be made for recognition by Chile of Landreau's claim as a prior lien upon any territory which Peru may be required to cede to Chile." Mr Blaine, Secretary of State, to Mr Hurlbut, 4 August 1881: 1 Wharton 359

[2] 1 Wharton 348, 6 Moore 43. [3] 1 Wharton 350, 6 Moore 43.

which the act of the constituted authorities effecting it meets with from the body of the people, and such approval may be most convincingly manifested by a popular vote, or by an election *ad hoc* of the parliament or other authority which takes on itself to effect the desired end, although it cannot be said that the mere notoriety of the popular sentiment will be an insufficient justification. If the state is extinguished, as England, Scotland, and Ireland have been respectively extinguished as states by their incorporate union in the United Kingdom, or Texas by her incorporate union with the United States, the personality of the community perishes with it, and, whatever form may have been given to the arrangement, there can be no real treaty for want of continuing parties. The observance of any stipulations that may have been made can in such a case be only a matter of conscience for the government resulting from the incorporation. In estimating the conscientious duty it will have to be remembered that the population of each incorporated area will not necessarily represent the state which once existed in it. There may have been emigration and immigration, and even between successive generations on the same soil the moral unity will have been impaired by the absence of a separate state tie as the connecting link. The new government will therefore have to act on a comprehensive view of the situation as from time to time it will present itself. Less freedom than this in dealing with stipulations from which, since there is no legal tie, there can be no legal release, would be incompatible with the nature of a moral being; and the parties which have sunk their own existence must be considered as giving the full attributes of a moral being to the state which they have set up in their place. If the uniting states only lose their separate characters of states of international law, as Austria and Hungary, there may be a real treaty between them.

The extinction of a state by conquest will take place when the conquering power has declared its will to annex it and has established its authority throughout the territory, any opposition still made being on the scale of brigandage rather than of war, and no corner remains in which the ordinary functions of government are carried on in the name of the old state. In this case as well as in that of voluntary arrangement,

and for the same reason, the constituted authorities, whether executive or legislative, to whom in this case may be added the generals commanding the troops, can give no legal sanction to the extinction, though the generals may contribute to the result and spare much suffering to their own people by a capitulation. A sanction may be sought in a popular vote or the election *ad hoc* of an assembly, but it would have little value even morally, since it would only register the fact that resistance had become hopeless. England proclaimed the annexation of the entire territories of the South African (Transvaal) Republic and Orange Free State before their conquest had in fact been completed, but the fixed resolve to complete it had been declared, and had been carried so far into execution that the final result was not in doubt. At the same time large tracts of country were in British occupation in which the ordinary functions of government had to be provided for, all Transvaal or Free State authorities having left them, and in those circumstances it would have been idle to establish an administration for them, whether of justice, finance, or any other department, in any name but that of the Queen. The proclamation therefore may well be justified, although it would have been unfair and improper to apply the penalties of rebellion to troops still holding out in the field, or to civilians assisting them outside the British lines.

With regard to the attitude to be adopted by third powers, a conquest, like the coming into being of a new state, is a fact which cannot be long ignored without offence to those in whose favour it occurs, yet which cannot be hastily forced on the acceptance of other members of the international society whom it may affect. These must have a reasonable time to appreciate the facts alleged, and to study them in connection with their own rights and interests, which may require some safeguard or acknowledgment on the occasion. Thus a judgment has to be passed which belongs to the political organs of a government. If a case were brought before a court of law which depended on an alleged change in the international condition of a certain piece of territory, whether by the acquisition or extinction of state existence or even by partial cession, and whether the change alleged affected the state to which the court belonged

or only foreign states, no evidence, however cogent, could absolve the court from being bound by the decision of its own government as to the change alleged.

A state may be extinguished by a conquest made by several powers in concert, as happened to Poland in 1795 on its last partition between Russia, Prussia, and Austria. Or it may happen that different powers may seize without concert different portions of the territory of a state undergoing extinction, as France occupied part of the Khalifa's territory at Fashoda while his power was being destroyed by the British and Egyptians at Omdurman, but he with some of his forces was holding out. In the latter case it seems impossible to say that the occupation of the capital, or of the larger part of the territory, so far completes the conquest as to give a title to the whole against a third power occupying another part. But in the instance mentioned, since the abandonment of the region by Egypt had never been complete and definitive, the title of the restored Egyptian government was superior to that of either England or France by conquest, and is the one which after the fall of the Khalifa was practically relied on and set up, while the incident with France was terminated in such a manner as to furnish no precedent for the case of concurrent but not concerted conquests.

Consequences of the Extinction of a State.

Of the consequences which follow the extinction of a state some result simply from the continuity of the annexing state before and after the annexation, or from the continuity of the legal condition of the territory in all but what concerns the sovereignty over it, and as these correspond to the consequences which follow from a transfer of territory by partial cession, in which case a third continuity, that of the ceding state, is added, they have already been noticed in speaking of the *Continuity of States through Changes of Territory.* Thus the treaties of the extinguished state fall to the ground, with the exception, if exception it be, of transitory or dispositive ones, but, so far as the interests of individuals are affected, the annexed population gains the benefit and comes under the burden of the treaties of

the annexing state[1]. Thus also the annexing state takes the territory as it stands, subject to the servitudes which transitory or dispositive treaties have impressed on it. And another result, the same for the territory of an extinguished state as for a ceded territory, is that the law of the land which changes masters—civil, criminal, and administrative as distinct from

[1] This is not undisputed, and the principal authorities are thus summed up by Ullmann, pp. 71, 72. "There is," he says, "a difference of opinion about the treaties of commerce, navigation, extradition, etc. of an annexed state. According to one view these treaties fall to the ground, like those of alliance and political amity. According to another view 'the annexing state must consider itself bound by all the commercial and other international conventions which bound the annexed state' (1 F. de Martens, 369). A third view holds a general answer to this question, founded on principle, to be impossible, and leaves the nature and scope of the convention and the concrete circumstances to decide." For the first opinion Ullmann quotes 1 Rivier 72; Hartmann's *Institutionen des Europäischen Völkerrechts in Friedenszeiten*, 1874, p. 35; and Despagnet, § 91, who thinks that the political and economical treaties of the annexed state fall to the ground, yet on the other hand that a specially agricultural annexing state could not claim that its commercial treaties should be applied to a chiefly industrial territory annexed by it. For the third opinion the authority given is 1 Calvo, § 98; and a reference is added to Bluntschli, § 50, who says that "the rights and obligations of an annexed state pass to the state which annexes it, whenever their maintenance is possible and can be reconciled with the new order of things." This Ullmann regards as much too elastic a limitation, but I do not find that for himself he says anything more definite than, after enumerating as on p. 60, above, the Hanoverian treaties which were held to cease on the incorporation of Hanover with Prussia, that "all treaties of that kind ought not to be treated alike." Max Huber, § 56, declares himself frankly for the first opinion, and so does Hall, § 29; nor does the point seem to us to admit of much doubt. Every international treaty supposes international persons as parties to it; the annexed state has ceased to be such a person, and the annexing state, as we shall see, cannot be regarded as continuing its person; and the third opinion encounters the further difficulty that it furnishes no means of authoritative decision in any particular case. A like incurable vagueness may be objected to Despagnet's limitation of the application of the commercial treaties of the annexing state to the annexed territory, not to mention that it would encourage raising questions on the occasion of insignificant geographical accessions. The treaties of the annexing state must apply, subject in sufficiently grave cases to be denounced as wholes, and not merely for the territory newly brought under them.

political—remains unaltered until the new master, by express legislation, either modifies it in detail or replaces it by the law of his own land. But there are consequences of a more complex nature which demand treatment in a separate section.

State Succession: General.

The title by conquest has its base in the force by which a thing or a tract of land is seized, and by which the actions of a population are controlled. But it must always have been felt that the title so gained cannot be limited to the extent covered by the *de facto* basis. The incorporeal rights of the displaced government, and the allegiance of its subjects who are outside the annexed territory but maintain their connection with it, are claimed by the conqueror although they elude seizure by him. Nor could it be satisfactory that the rights acquired through the extinction of a state by conquest, having so much in common with those acquired by a partial cession of territory, should be placed baldly on a *de facto* title not existing in the latter case. Hence has arisen the idea of the succession of state to state as an institution of international law comparable to succession on death as an institution of private law, each bringing under one head a number of relations of property and obligation, and applying to them rules not found elsewhere but arising from the point of view peculiar to the institution. The existence of such an institution in a concrete case is set up by some investitive fact, as the death of the ancestor investing the heir, or the conquest or cession investing the acquiring state, and in that way justice is done to whatever of a *de facto* nature may lie at the base of the title, while the variety of the investitive facts in the cases of conquest and cession affords play to the varieties of which the institution is susceptible. The resemblances and differences of those cases have already been glanced at. To put them more fully, the points of resemblance are the change of sovereignty over the acquired territory, the continuing and unaffected identity of the acquiring state, and the continuing and unaffected legal condition of the acquired territory as a field for modern civilised life. The point of

difference is that in the milder case the ceding state is there to assist in shaping the succession, while in that of conquest the succession must shape itself as it can, subject to the duty of not interfering with the continuance of modern civilised life in the territory.

The Roman idea of succession on death in private law was the continuation of the deceased's person by the heir, and it was borrowed by Grotius without modification as the idea of state succession. *Haeredis personam*, he says, *quoad dominii tam publici quam privati continuationem, pro eadem censeri cum defuncti persona, certi est juris*[1]. This occurs in a chapter not dealing with hereditary succession in a monarchy, but with the question *quando imperia vel dominia desinant.* But that the successor state, coming in with its own notions of government and with freedom to apply them, cannot properly be considered as continuing the person of the displaced state, was seen as early as by Cocceji, who wrote in his commentary on Grotius: *Negamus in successionibus regnorum successoris personam pro eadem censeri cum persona defuncti*[2]. The true doctrine therefore seems to be that of Max Huber, who, recognising that his point of view is the same as that of Cocceji, writes thus:

"The notion of succession is a general one in law, and belongs exclusively neither to private nor to public law. Succession is substitution *plus* continuation. The successor steps into the place of the predecessor and continues his rights and obligations; so far the successions of private and public law agree. But we now have to distinguish between those kinds of succession. A civil successor who steps into the place of his predecessor steps into his rights and obligations as though he were himself the predecessor. That is the universal succession of private law in the Roman sense, at least according to the prevailing doctrine. But the successor of international law steps into the rights and obligations of his predecessor as though they were his own.....State succession is substitution *plus* continuation *quoad jura*, not *quoad defunctum*[3]."

State Succession: Persons.

The first application which we shall make of what we conceive to be the true doctrine shall be to the effect which

[1] Grotius, 2, 9, 12.

[2] Quoted by Max Huber, *Die Staaten-Succession*, Leipzig, 1898, note 42.

[3] Max Huber, u. s., §§ 23, 25.

state succession has on the allegiance or nationality of the persons inhabiting the acquired territory or in one way or another connected with it; in other words, the question of man as an object of state succession.

It cannot be doubted that the nationals of an extinguished state who continue to reside in the territory, or who, not being within it at the moment of the change, return to it for any but a temporary purpose, become the subjects of the new government. They do so by accepting its rule and protection, even if the succession did not of itself comprise them among its objects. But what of the nationals of an extinguished state who were not within its territory at the moment of the change, or leave it after the change without any undue delay, repudiate any tie to the conqueror, and do not return to the territory except for the removal of their goods or some other such temporary purpose? The decisive consideration appears to be that allegiance is a purely personal tie, and therefore cannot be claimed by the successor state, which is not identified in person with the extinguished state, merely on the ground that it was due to the latter. If the individuals in question do not get themselves naturalised elsewhere, they can have only the legal position which the state in which they reside grants to resident aliens, and such an international position as depends on residence. That *deminutio capitis* they cannot avoid. But this view has not always been taken. Rivier says that the rule that the nationals of a conquered state become the subjects of the conqueror, and can be treated by him as such notwithstanding that they have become naturalised elsewhere, was anciently practised in all its fulness, as by France under the first republic[1]. And he quotes the case of the Count von Platen-Hallermund, a Hanoverian who emigrated on the conquest of his country by Prussia, and who was nevertheless found guilty of high treason in 1868 by a Prussian court, a judgment condemned by Zachariae and Neumann. But, as he points out, this precedent was not followed in 1869, when some young men of Frankfort, also conquered by Prussia, who had naturalised themselves in

[1] But on the annexation of the republics of Mulhouse and Geneva the inhabitants were allowed to avoid becoming French on condition of emigration. Cogordan, p. 291.

Switzerland in order to escape military service, were expelled instead of being obliged to perform such service. And he sums up to the effect that the old rule is inconsistent both with sound policy and with the increasing tendency to emancipate men from the soil, shown by the general liberty of emigration and the regular use of the clause of option in cessions of territory, but that international law is not yet fixed on the subject[1].

If the case is one of partial cession, of which the recognition of the independence of a part split off is for this purpose only an instance, the ceding state performs in making the cession a last act of sovereignty over its subjects connected with the ceded territory, and is as well entitled to do so over those absent from it as over those present in it. Anciently cessions were carried into effect on the footing that the allegiance both of the present and of the absent was transferred by that means without an option being given, which is said to have been done for the first time by the capitulation of Arras in 1640, but the established practice has long been to fix a time within which individuals may, formally or practically, opt for retaining their old nationality, on condition of removing their residence from the ceded territory[2]. The succession then comprises all those individuals, whether present on the ceded soil or absent from it, who fall

[1] 2 Rivier 438, 439; quoting, for the Count von Platen-Hallermund's case, Holtzendorff's *Allegemeine Deutsche Strafrechtszeitung*, 1868, t. 1, § 12, and for the memoirs of Zachariae and Neumann on it, Stoerk, *Option und Plebiscit*, pp. 150-155.

[2] There are cases in which this condition has not been imposed, because it would have had no political importance, as the cession of California by Mexico to the United States in 1848. Previous to the Treaty of Utrecht (1713) it was usual to require those who opted for emigration to sell the real property which they had in the ceded territory, and there are examples of this as late as the Treaties of Campo Formio (1797) and Amiens (1802). There is even one in the case of the cession of a part of Bessarabia made by Turkey to Russia in the Treaties of San Stefano and Constantinople (1878 and 1879), but this, as Cogordan remarks, may have been due to the peculiar conditions of the territory in question. The treaties of 1814 gave an option to the inhabitants of the territories ceded by France; but in France and the Netherlands, though not in Prussia, an interpretation prevailed which was based on the system that the extension of the limits of France had only been an illegal usurpation. As to all the topics of this note see Cogordan, pp. 300–322; Despagnet, § 336.

within its terms as shaped with the concurrence of the ceding state.

In the last paragraph we have spoken of "subjects connected with the ceded territory," but we must now enquire more closely who the individuals are whose allegiance is transferred if they do not opt for their old nationality and fulfil the conditions stipulated for the validity of their option. This, as we have said, depends on the terms of the cession, but two rival principles have dictated those terms in different cases. One, and the older of the two in this application of it, is the principle of domicile. It is the subjects of the ceding state domiciled in the ceded territory, whether present in it at the moment of the change or not, who are *prima facie* comprised in the cession, and must opt and fulfil the other conditions if they are to escape the transfer: those subjects who at the moment of change are not domiciled in the ceded territory, even though present in it or having at a previous date been connected with it, are not concerned in the transfer. This was the common law, as laid down by Pothier for France[1] and by the English courts for this country[2], and carried out in the treaties, among others, of Ryswick, Utrecht, Campo Formio and Zurich, in all which the terms used are inhabiting (*habitant*), dwelling (*demeurant*), or residing (*résidant*), terms which, for want of any other precise definition, must be and are in such cases understood in the legal sense of domicile. The other principle is that of place of birth, which, if adopted, causes the subjects of the ceding state born in the ceded territory, whether present in it at the moment of change or not, and no others, to be *prima facie* comprised in the cession. The treaty of Turin (1860) applied both principles, transferring to France all those Sardinian subjects who were either domiciled or had been born in Savoy or Nice, in default of option and the establishment of their domicile in Italy if it was not already there. The term used in the treaty to express birth in Savoy or Nice is *originaires de*, which in private law usually means connected with a place by parentage as contrasted with domicile, but in

[1] *Traité des Personnes*, 1re partie, titre 2, sect. 1re.

[2] *Doe* v. *Acklam*, 2 B. & C. 779; *Doe* v. *Mulcaster*, 5 B. & C. 771; *Doe* v. *Arkwright*, 5 C. & P. 575; *re Bruce*, 2 C. & J. 436, 2 Tyr. 475; *Jephson* v. *Riera*, 3 Kn. 130.

diplomatic language refers to the place of a person's own birth, irrespective of any questions about his ancestors[1]. By the treaty of Frankfort, 10 May 1871, combined with the additional convention of 11 December 1871, the same system was applied to the cession of Alsace-Lorraine which had been applied to that of Savoy and Nice[2]. In the cession of the island of St Bartholomew by Sweden to France, 1877, the principle of domicile without reference to place of birth was reverted to; and this seems to be the system which carries the best presumption of defeating the wishes of the fewest persons.

In cases of cession, those who opt for their old nationality and fulfil the conditions attached to the option must be considered as never having lost that nationality. What nationality is to be provisionally attributed to those for whom the option remains open may depend on the terms stipulated, or perhaps on the purpose for which the question has to be asked, but since the number of options which are carried through is never so great as that of the persons whose nationality is ultimately changed, there would appear to be less inconvenience in treating the new nationality as the provisional one, except for purposes, like military service, which will bear a little delay and for which a wrong attribution would be a hardship.

With regard to the option which in cases of cession may be allowed to married women, or to minors with or without the approval of their parents or guardians, to the question whether the time for option will run against a minor, and to that of the

[1] This diplomatic sense was recognised by the tribunal of Lyons, in a judgment of 24 March 1877 on the nationality of an *originaire* of Savoy; Cogordan, annexe F; and by the German government, in a communication made by its ambassador at Paris to the French government on 18 December 1871; Cogordan, pp. 342, 343. It is scarcely disputed by Cogordan and is admitted by Despagnet, § 335; but the French government had put to Germany the question what she understood by it in the treaty of Frankfort, and was answered by the communication mentioned.

[2] There was much dispute about the interpretation of these documents, and certainly Art. 2 of the treaty was badly expressed, but in spite of the high authority of M. Cogordan we think that the Count von Arnim's despatch of 1 September 1872 gives the correct view, and that which must have always been entertained by the German government. See Cogordan, pp. 340–346, and for the cession of St Bartholomew, pp. 376–9.

effect which the option of a husband or parent will have on the nationality of his wife or minor children, the legislations of different countries differ so widely on the analogous questions arising on naturalisation that a general agreement cannot be expected[1].

State Succession: Things and Civil Obligations.

It is generally agreed that the rules of state succession as affecting the right to things and other civil rights are the same in the case of the extinction of a state as in that of a partial cession of territory. Such rights do not depend for their existence on the person of the state under, by or against, which they exist, and therefore do not fall to the ground by the extinction of that person. On the other hand, the mode of their existence may be affected by their coming into relation with a new public person, who will act according to his own views of public policy, but that change takes place equally, whether the public person with which the rights in question were formerly in relation is extinguished or retires by cession. Hence the Transvaal Concessions Commissioners, who had to deal with rights of a mixed public and private nature granted by the displaced government, said in their report: "In considering what the attitude of a conqueror should be towards such concessions, we are unable to perceive any sound distinction between a case where a state acquires part of another by cession and a case where it acquires the whole by annexation[2]." Hence also the rules which we shall proceed to consider must be understood as applying equally to conquest and to cession, unless it is otherwise expressed.

First, the purely private rights of individuals, whether of property or of obligation, are untouched by the change of government.

Secondly, the acquiring state succeeds to the entire position of the displaced state as owner of the assets, or what is called the active succession. And this rule extends by analogy to the case of the complete overthrow of one of the parties to a

[1] See *re Bruce*, 2 C. & J. 436, 2 Tyr. 475.

[2] Parliamentary Paper, Cd. 623, p. 7.

civil war, in which case there is an extinguished government though not an extinguished state. It was applied by the English courts to the cotton in England belonging to the government of the Confederate States, which was held to pass by their overthrow to the United States, subject to such right of account against the latter as the holders of it would have had against the former. Without that qualification, it would not have been the entire position of the displaced government as owner of the assets to which the acquiring state would have succeeded: the maxims, *res transit cum suo onere*, and *bona non intelliguntur nisi deducto cere alieno*, would have been violated[1]. In consequence of this rule the fortresses, arsenals, and other objects belonging to the displaced state in the territory which changes masters pass to the acquiring state unless specially excepted by the treaty in a case of cession. So also the incorporeal rights of the displaced state connected with the territory, and, if that state be extinguished, its property and rights of action abroad, as for example ships and bank credits.

Thirdly, the acquiring state is affected by what is called the passive succession, in other words it steps into the civil liabilities of the displaced state, though of course, in the case of a partial cession, only into those of them which exist in connection with the ceded territory. That doctrine, for the case of conquest, was expressed as follows by Mr Adams, Secretary of State of the United States: "The conqueror," he wrote to Mr Everett, 10 August 1818, "who reduces a nation to his subjection receives it subject to all its engagements and duties towards others, the fulfilment of which then becomes his own duty. However frequent the instances of departure from this principle may be in point of fact, it cannot with any colour of reason be contested on the ground of right[2]." This must be

[1] The United States did not submit to the account, and therefore failed to get the cotton; but that must be attributed to the bitter sentiment engendered by the secession and the war rather than to any serious doubt as to the doctrine. See for the general doctrine the language of Vice-chancellor Cranworth in *King of the Two Sicilies* v. *Willcox*, 1 Sim. N. S. 327–9; of Vicechancellor Wood in *United States of America* v. *Prioleau*, 2 H. & M. 563; and of Vicechancellor James in *United States of America* v. *McRae*, L. R., 8 Eq. 75.

[2] 1 Wharton 19, 1 Moore 334.

understood of civil engagements and duties, that is those enforceable in courts of justice, or which would be so enforceable if the state in question allowed itself to be sued in its courts: to extend it to international treaties would be contrary to the rule which has been already noticed[1]. But it may be asked whether the liability of the acquiring state for the obligations of its predecessor is unlimited, and whether it is without exception.

On the first of those questions it is rare to find an express statement. Max Huber however lays it down that the liability of the successor state is without benefit of inventory, that is without a limitation to the value of the assets received, and gives the following reasons for his opinion. The benefit of inventory is contrary to the idea of succession, and was a late introduction into Roman law. The case against it is stronger in the succession of a state, which comes in by its own will, than in that of a private successor. The assets received cannot be valued, including as they do the taxable capacity of the territory and population changing masters. And, which for Max Huber is the decisive consideration, the whole of the assets pass as an inseparable consequence of the succession, and the passive is an inseparable accompaniment of them[2]. This reasoning is not altogether satisfactory. The benefit of inventory exists in Roman law, as the latter has stood ever since international law had its commencement. A private successor is not bound to accept the succession, so that he also comes in by his own will. That the assets cannot be exactly valued does not prove that there is no reasonable limit to them. And whether the passive is without limitation an inseparable accompaniment of the assets is the very point to be proved. A more solid consideration appears to be that either the annexed territory and population will be so merged in the possessions of the annexing state that their taxable capacity will not easily be identifiable, so as to furnish the measure of a limitation, or, if they are maintained as a distinct unit for fiscal purposes, the annexing state may for its own political objects refrain from imposing on them the full amount of taxation which they could bear. But the conduct of the annexing state suggested as possible in the

[1] Above, pp. 59, 60.

[2] Max Huber, u. s., § 232.

latter case can scarcely be presumed, and perhaps the safest conclusion is that if the territory changing masters is merged for revenue purposes in that of the annexing state the liability of the latter will be unlimited, but that, if it is maintained as a separate fiscal unit, the obligations of the extinguished state, or those of the ceding state connected with the territory, will not pass over beyond the value of the assets received, including such taxation of the territory as it can reasonably bear without reference to the political convenience of the annexing state. We have seen that in the case of cession the transferred province continues to bear its provincial debt without any change of the security for it[1]; and Hall suggests, correctly as we think, that "local debt and general debt are only different words for the same thing when a state loses its separate existence and is taken bodily in to form a member of another state[2]." There seems therefore no reason why the general debt of an extinguished state should fare better, in point of the future security for it, than the local debt of a transferred province.

A classical case of the extinguishment of a state without its territory being maintained as a separate fiscal unit occurred on the absorption of Texas, an independent republic, into the United States as a state of the Union in 1845. It was agreed that the unappropriated lands within the limits of the republic were to be retained by the state of the Union and applied to the payment of the debts and liabilities of the republic, the residue to be disposed of as the state of the Union might direct; "but in no event were said debts and liabilities to become a charge upon the government of the United States[3]." Of course the last clause could not, as against third parties, free the United States from any liability that might be incurred by them through an absorption by which Texas was deprived of her main source of revenue, the constitution of the Union prohibiting the states from raising a revenue by custom duties. A British holder of bonds of the absorbed republic on which there was default brought a claim against the United States under a mixed commission appointed in pursuance of an Anglo-American

[1] Above, p. 62. [2] Hall, § 29.
[3] United States *Statutes at Large*, vol. 5, p. 798.

convention of 8 Feb. 1853 for the adjustment of claims between the two countries. The British and the United States Commissioners gave opposite opinions, and the umpire—a highly respected American citizen, but not a legal expert, Mr Joshua Bates—pronounced that the "commission cannot entertain the claim, it being for transactions with the independent republic of Texas prior to its admission as a state of the United States[1]." It does not clearly appear whether this meant that the United States were not liable or that for some reason the claim was not within the scope of the commission, but Dana has recorded his opinion in favour of the liability. "The entire public system of Texas," he writes, "has passed into other hands, and no such state of things any longer exists as that to which the creditor looked. It may be better or worse, but it is not the same; and if the duties laid by the United States and collected in Texan ports did not in fact pay the debts, it would be unjust for the United States to limit the payment of the creditor to them. The truth is, by the annexation the United States changed the nature of the thing pledged, and is bound generally to do equity to the creditor[2]."

Coming now to the question whether there are exceptions to the rule that a successor state is liable for the obligations of its predecessor, it would seem difficult to hold the conqueror liable, whether with or without benefit of inventory, for a loan which an extinguished state had contracted for the purpose of the war. Those who lend money to a state during a war, or even before its outbreak when it is notoriously imminent, may be considered to have made themselves voluntary enemies of the other state, and can no more expect consideration on the failure of the side which they have espoused than a neutral ship which has entered the enemy's service can expect to avoid condemnation if captured. The principle may sometimes have a wide application. When Cuba was emancipated from Spain by the Spanish-American war, it could scarcely be expected that either she or the United States should recognise the loans which Spain had charged on

[1] *United States Arbitrations*, vol. 4, p. 3594. What is said on p. 3593 should be taken into account in reading the statement of Mr Bates's judgment in 1 Wharton 22.

[2] Dana's Wheaton, § 30, note 18.

her for the cost of repressing the Cubans, during the long and intermittent struggle of which her emancipation was the close[1]. But different considerations apply to the obligations which a state has contracted for the purpose of a war, either by requisitions or the destruction of property not involving the consent of those towards whom the obligation of indemnifying them arises, or by contracts in which the consent of the contractors is involved, but in the way of business and not so as to implicate them as voluntary parties to the struggle. If the state is extinguished, it is not generally thought that there is anything to take such obligations as these out of the rule of the successor's liability; but if the cession is a partial one, the question occurs whether the obligations in question contracted in the ceded province ought to be regarded as local, so as to pass to the state which acquires the province, and not rather as those of the ceding state, in whose interest the war must be considered to have been waged.

By Art. 8 of each of the Treaties of Zurich and Vienna, by which Italy acquired Lombardy and Venetia respectively from Austria, she undertook as towards Austria to satisfy the local obligations of those provinces. After the former treaty, on 16 August 1860, the Italian Minister of the Interior issued a circular stating that "the government assumed the engagement,

[1] In an interesting article contributed to the Berlin periodical *Die Nation* of 22 April 1899, von Bar arrives at the conclusion that Cuba, whether her position—at that time uncertain—was to be more or less independent of the United States, would remain liable for so much of the loan money charged on her by Spain as had been spent on railways, harbours and other works of civilisation for her benefit, but that neither Cuba nor the United States would be liable for so much as had been spent in maintaining her dependence by force. Spain too would be bound to furnish both to the victors and to her creditors, from her archives, the information necessary for so dividing the debt. In the same article von Bar points out that even where a debt remains chargeable on a ceded province or a conquered territory the new government cannot be fettered in its control of the taxation, or be obliged to admit the interference of an agency introduced by the displaced government; and that therefore a specific security on the customs levied within the province or territory by the state to which it belonged, and a stipulation for the payment to a particular bank of any revenue comprised in the security, must fall to the ground.

and has decided in the council of ministers, to consider compensation for the losses caused by the requisitions regularly made by the Austrians in Lombardy as a charge on the state[1]." The Italian courts however, while admitting that this would be the rule in the case of the total incorporation of a state, as happened to Tuscany and Naples, hesitated to lay it down for cases of partial cession until the Court of Cassation of Florence declared, by a judgment of 30 March 1877, that "by public law the state which succeeds in a part of the territory of another state is bound, independently of special conventions, by the obligations legally contracted by the latter in relation to the territory in which it succeeds[2]." The point was raised again in an action against the ministry of finance for the price agreed on with the Austrian government for the execution of certain works of fortification about Venice, and the same Court of Cassation, by a judgment of 25 May 1896, while saying that it might have been doubted whether the obligation was really incurred for the public interest of the ceded provinces, refused to depart from the interpretation given in previous cases, and decided for the plaintiffs on the ground that the works were designed and executed for the security of the Venetian provinces, though being at the same time useful for the general defence of the state which then exercised the rights of sovereignty in them[3].

By the terms on which the forces of the South African Republic and the Orange Free State surrendered to Lord Kitchener on 31 May 1902, the British government assigned a sum of £3,000,000 "for the purpose of assisting the restoration of the people to their homes" and giving a fresh start in life to those who "owing to war losses" needed it; and all notes issued under Law 1 of 1900 of the South African Republic, and all receipts given by officers in the field of the late republics or under their orders, if found to have been duly issued in return for valuable considerations, were to be received "as evidence of war losses suffered by the persons to whom they were originally given." And it was declared that the government was prepared, in addition to that free grant, to make advances on loan for the

[1] Gabba, *Quistioni di Diritto Civile studiate da C. F. Gabba*, 1882; p. 383.

[2] 2 Holtzendorff 40.

[3] 26 Clunet 864.

same purposes free of interest for two years. But no foreigner or rebel was to be entitled to the benefit of the clause containing the above provisions. With regard to a further £2,000,000 afterwards granted, Mr Chamberlain answered as follows a question put in the House of Commons: "The payments in respect of depredations by the Boers or of property commandeered by the late Transvaal government during the war are being made as an act of grace and without admitting any liability. The object which the government has had in view in making such payments is to assist individual loyalists who have suffered direct losses during the war in the same way as assistance is being given to Boers under the terms of surrender. Acting on this principle, claims from companies and large firms have not been entertained, and no distinction has been drawn between companies registered in England and those registered in the Transvaal[1]." Thus between the course pursued by Italy after the wars of unification and by England after the South African War the practical difference is not great, but the mode in which the respective results have been arrived at illustrates a difference which the student of international law should notice, as it is found in other parts of his subject. Italy, which may be taken as representing the most modern ways of thought and action, adopted a juridical rule and acted on it; England, a good representative of the older governments, reserved a large part for discretion.

For the sake of the English reader we must here notice the dicta of the Transvaal Concessions Commissioners that "it is clear that a state which has annexed another is not legally bound by any contracts made by the state which has ceased to exist, and that no court of law has jurisdiction to enforce such contracts if the annexing state refuse to recognise them[2]." The latter dictum is true, since courts of law are bound by the will of the sovereign power of the country, whether that will be just

[1] *Times* of 3 April, 1903; "Questions not answered orally."

[2] Parliamentary Paper Cd. 623, p. 7. The commissioners quote the judgment of the Judicial Committee in *Cook* v. *Sprigg* [1899] A. C. 572, on which observations may be made similar to those made in the text on the utterance of the commissioners. See an article on *The Nature and Extent of the Title by Conquest* which we contributed to the *Law Quarterly Review*, vol. 17, p. 392.

or unjust. The former dictum, denying all continuing legal obligation of contracts in cases of state succession[1], is to be explained by the narrow meaning which the commissioners evidently attached to the term "legal," partly from attachment to Austin's narrow definition of law[2], and partly from connecting the term exclusively with the ordinary courts of law, which in England are not the only channels of redress where the Crown is concerned. The legality of a claim, in any but a misleading sense, does not depend on the particular method that ought to be taken in order to enforce it. In any case the dictum was superfluous for the commissioners' object, which was only concerned with concessions presenting, as they observe, "examples of mixed public and private rights." It therefore need not be further dwelt on, but the subject of concessions, where these take the form of privileges of a public nature granted to private parties by the displaced state, is important in the doctrine of state succession.

The succession of a state to its predecessor is qualified by the circumstance that it is the public law and policy of the successor which are to prevail in the future, as being inseparable from his person, which remains his own while he steps into the other's position[3]. This is worked out by Max Huber in the following paragraphs:

"§ 94. Rights which are a mixture of private and public rights perish so far as they are public, in case the successor state does not possess a corresponding institution. If it possesses rules which apply to the case they will in the future govern, as for example in the cases of fiefs, knightly property (*Rittergüter*), guilds with compulsory powers, compulsion to grind at a certain mill, monopolies of sale, rights of patronage, schools, saleable appointments, mintage and postal rights enjoyed by private persons, exemptions from military service, etc.

§ 95. All subjective private rights are maintained in favour of all individuals and corporations, and the personality and property of institutions are secured to them, so far as no rule of the public law of the

[1] Only conquest is mentioned in the dictum, but the commissioners treated the case of cession as undistinguishable. See above, p. 74.

[2] See above, p. 8.

[3] See above, p. 69, and von Bar's remarks on specific securities for public debts, quoted in the note, p. 79.

successor state prevents it. If such a corporation is to be extinguished, the new sovereign must proceed as though it had already existed in his country and he was now legislating for its suppression."

Thus the continued existence of concessions must depend on their not being in conflict with the public law and policy of the annexing state, but if they are cancelled the persons interested will be entitled to such compensation as that state grants on cancelling a concession of its own. This doctrine, which we approve, we understand to be in substantial agreement with the view of the Transvaal Concessions Commissioners.

Notes to Chapters III and IV.

Page 24. The state of Johore in the Malay peninsula was received under British protection by a treaty of 11 December 1885. In answer to a question put by Mr Justice Wright in *Mighell* v. *Sultan of Johore*, C. A. [1894] 1 Q. B. 149, the Colonial Office declared that the relations between Her Majesty and Johore under that treaty were those of alliance and not of suzerainty and dependence. This answer was in accordance with the true character of protectorates, which, as will be seen in the following section, do not involve the relation of suzerain and vassal, but in strict language the character of independence cannot be claimed for them. See page 21.

Page 32. The Pragmatic Sanction was brought by the emperor Charles VI before the council in 1713, made public in 1720, and became law by the Hungarian diet's acceptance of it in 1723.

Page 43. The federated Malay States are not a part of the Indian empire in any sense of that word. They have been since 1874 under British protection as a relation of international law. See the first of these notes as to the similar political situation of another Malay state, the Sultanate of Johore.

Pages 45, 57. The courts of law are bound by the executive department's determinations as to what new states, whether arising from insurrection or otherwise, are recognised, and as to what territory is recognised as belonging to a given state; but

they can act on the public notoriety of such determinations. *Thompson* v. *Powles*, 2 Simons 194; *Jones* v. *United States*, 137 U. S. 202; *Foster* v. *Neilson*, 2 Peters 253; and the notes to those cases in Scott's *Cases on International Law*, pp. 38, 44, 76.

Page 60. (1) With reference to the principles governing the consequences of a transfer of territory, a province gaining its independence must be considered as a state holding towards the old unity the relation of a transferee. Thus the "rights, privileges and immunities" which were enjoyed in Mexico by British subjects under an Anglo-Spanish convention of 1786 would, but for a stipulation between Great Britain and the new Mexican state, have no longer been enjoyed by them after Mexico had gained its independence. See Hall, § 27.

(2) Notwithstanding the application of the Prussian treaties to Hanover after its annexation by Prussia in 1866, the German government declined to admit that the practically identical treaties for the regularisation of naturalisation, which the United States had entered into with the North German Union and with the several South German states, applied to Alsace-Lorraine after its incorporation with the German empire formed by the union of those dominions. The United States continued to claim such application, and the cases affecting Alsatians and Lorrainers naturalised in them have been in fact disposed of in accordance with that claim, without any express relinquishment of its doctrine by the German government. See 3 Moore, § 392, pp. 364–376. It is therefore possible that Germany may be considered to hold, for the treaties of an annexing state, the third view mentioned by Ullmann, as quoted in the note on p. 67, for those of an annexed state, namely that no general statement is possible about them.

(3) As to the case of Madagascar, France first substituted a *prise de possession* for her protectorate over that island, but the powers which had treaties with it did not admit that this caused them to fall to the ground, and unqualified annexation was then resorted to by means of the law of 6 August 1896, which declared Madagascar to be a French colony. See the *exposé des motifs* of that law, 23 *Journal de Droit International Privé* 921. Lord Salisbury, with reference to this step, did not put forward any idea that the Anglo-Malagasy treaty could of

itself survive the annexation, but objected that assurances had been given that the object of the French expedition was to maintain and not to destroy the protectorate. See *Parliamentary Papers*; Africa, no. 8, 1897, and France, no. 1, 1899.

Page 73. By Art. 9 of the Spanish-American treaty of peace, 1898, Spanish subjects, natives of the peninsula, were allowed to continue to reside in the territories relinquished or ceded by Spain, at the same time preserving their allegiance, on condition of making within a year a declaration of their intention to preserve it. The civil rights and political status of the natives of the territories ceded were to be determined by the Congress of the United States.

Page 79. By Art. 7 of their treaty of peace, 1898, "Spain and the United States mutually renounced all claims for indemnity, national or private, of one government against the other, or of their subjects or citizens against the other government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for any thing done in the war. The United States shall adjudge and satisfy the claims of their citizens against Spain renounced in this article." The adjudication so provided for was made by a commission appointed under an Act of Congress. The discussion which took place between the United States and Spanish negotiators on the proposal of the latter, rejected by the former, that Spain should be relieved of the so-called Cuban debt, may be read in 1 Moore 351–385. When the United States negotiators found that the Philippine debt largely represented money employed by Spain in the war or in the previous hostilities with the insurgents, "they resolved in the final transfer to fix an amount [$20,000,000 —Art. 3 of the treaty] at least equal to the face value of that debt, which could be given to Spain as an acknowledgment for any specific improvements she might have made there not paid for by the revenues of the islands themselves. She could use it to pay the Philippine bonds if she chose": Mr Whitelaw Reid in the *Anglosaxon Review* for June 1899. The United States regarded the payment so made as precluding any claim against them for the passive succession of Spain, though the treaty was silent on the point. See also 35th Congress, 3rd session, Senate Document 62.

CHAPTER V.

THE TITLE TO STATE TERRITORY.

Territorial Sovereignty, Property, Eminent Domain.

We have appealed to our common experience for the fact that a state is an ideal body, having on the one hand a certain territory and on the other hand being composed of individual men as its members[1] We have now to consider a state in each of those relations, and first with reference to its territory. Still taking our stand on common experience, we are taught by it that two different kinds of right are enjoyed over the soil. One is that of property or ownership, through which private persons, and companies or other groups of persons of a private character—that is, for our present purpose, of a character inferior to the state—enjoy certain pieces of land exclusively one of another. Even the state may appear as the owner of landed property, as in the cases of the foreshore, public roads and rivers, arsenals and other public buildings, forests and other tracts of public land; in all which cases the state has a right of property, not distinguishable from that of a private person, in addition to the right which it has over the territory at large. The other right enjoyed over the soil is that which the state has over the territory at large, as well those parts of it which are in private ownership as those which belong to itself as owner. This is a right existing for the purposes of government, and comprises the right to act within the limits of the

[1] Above, p. 3.

territory upon or against all persons found there, and to dispose of the property in all parts of the territory, whether with or without compensation to private owners, as in the judgment of the state the purposes of government may require. Being a right of supreme government, it is usually and properly described as the sovereignty over the territory, to which in English dominion is equivalent though in Latin *dominium* means property.

So far as the territorial sovereignty of a state authorises it to interfere with property it is called eminent domain. An example of the right known by that name is seen in the familiar case of expropriation for public purposes, whether directly for the benefit of the state, as when it is desired to build a fortress, or in favour of private persons although for the general good, as when a railway company is empowered to take land. It would also be exemplified if the owner of the land on the coast were prohibited from using it in such a manner as to facilitate the encroachment of the sea; and other cases might be put. The distinction between eminent domain and the feudal right of escheat, by which the land of a vassal reverted to the lord on the failure of heirs of the particular description pointed out by the tenure, has not always been clearly seen. It has sometimes been thought that the right of escheat in case of a total failure of heirs, which belongs to the English king, of whom all the land of England is immediately or ultimately held, is of the nature of eminent domain, and is somehow helpful in giving the English state its right of appropriation for public purposes. But this is a mistake. Every state has internationally, and probably every state has constitutionally, the right of expropriation for public purposes whether feudal tenure exists in it or not; and a right of escheat, where it exists, is really a part of the property reserved to the lord, like the reversion on a lease. Eminent domain on the other hand is not a part of the property but a right of interfering with property, which it limits.

Another error sometimes committed with regard to eminent domain is supposing that the cession of a province by one state to another is made by virtue of it. In such a case there is no interference with private property by the mere force of the

cession. The ceding state alienates its territorial sovereignty, and the property in those parts of the soil which belong to it as property, but the private proprietors of the province are unaffected, and if the state receiving the cession desires to erect a new fortress or to enlarge an old one, it must acquire the necessary land from the owners by purchase, or by expropriation according to its laws. This is not the less true because a government may sometimes assume the power to cede land to a foreign state in property as well as in sovereignty, taking on itself the burden of expropriating the private owners. In that case there would be an exercise of the right of eminent domain, and if the treaty were made with the approval of the constitutional treaty-making power, the state accepting the cession would not need to enquire further about the constitutional existence of that right in the state making the cession. It is necessary for the intercourse of states that a government should be accepted internationally as representing, not only its state, but its subjects and all rights of whatever kind existing in relation to its territory, and so eminent domain is always an international right, indeed a part of territorial sovereignty[1].

In the middle ages the distinction between sovereignty and property was obscured so far as feudal notions prevailed, the very essence of those notions being to confound in a common haze the right of a lord to rule in his manor and the right of our sovereign lord the king to rule in his kingdom. A trace of this confusion remains in the use of the word dominion, which etymologically means lordship, to express territorial sovereignty; but the distinction was recognised as soon as international law took its place as a definite province of thought. When our subject is discussed in Latin sovereignty is *imperium*,

[1] *Jure civili omnia regis sunt, et tamen illa quorum ad regem pertinet universa possessio in singulos dominos descripta sunt....Ad reges enim potestas omnium pertinet, ad singulos proprietas....Sub optimo rege omnia rex imperio possidet, singuli dominio.* Seneca, *De beneficiis*, l. 7, c. 4–5.

Grotius says—1, 3, 6—*dominium eminens quod civitas habet in cives et res civium ad usum publicum.* But although sovereignty exists *in cives* for the purpose of international representation, the circumstance that *dominium* means property makes it better to restrict eminent domain as a technical term to the *res civium.*

property *dominium*, eminent domain *dominium eminens*; and Grotius writes: *imperium duas solet habere materias sibi subjacentes, primariam personas, quæ materia sola interdum sufficit, ut in exercitu virorum, mulierum, puerorum quærente novas sedes, et secundariam, locum qui territorium dicitur.* In the case which he has thus put, that of an emigrant people founding a new settlement, the sovereignty over the soil on which they established themselves and the property in it would be acquired together; so also would it be where an old state established its authority in a new country; and in the great age of discovery these were the most interesting cases. So Grotius proceeds: *quanquam autem plerumque uno ictu quæri solent imperium et dominium, sunt tamen distincta, ideoque dominium non in cives tantum sed et in extraneos transit, manente penes quem fuit imperio*[1]: property may pass even to foreigners, but the sovereignty of the state over the soil owned by them is not thereby affected. Still, in the minds of less clear thinkers, the fact that sovereignty and property were in new countries acquired together, and as we shall presently see under rules borrowed from property, perpetuated the confusion between them which had arisen from feudal ideas. The right of a state over its territory, instead of being distinguished as sovereignty, including eminent domain as internationally annexed to sovereignty, has been very often described as international property. Attention has been fixed on the two points of resemblance between territorial sovereignty and landed property, their exclusiveness—a state may exclude other states from performing acts of sovereignty in its territory, as an owner may exclude other persons from acting as owners on his land—and their being alienable. So fixed, the attention has been proportionately withdrawn from the cases in which sovereignty and property are alienated or otherwise dealt with independently the one of the other, being the overwhelming majority of the cases in which either is dealt with at all, and from the widely different parts played by them in the system of acts and purposes which makes up civilised life. But now at last the wisdom is widely

[1] *De Jure Belli ac Pacis*, 2, 3, 4. And see the quotation from Seneca on p. 86.

recognised of bringing into full relief the difference between two things which on the whole are rather contrasted than similar[1].

Title to territory: Old and New Countries.

When the owner or claimant of land has to show his title to it he starts from the proved or presumed ownership of some one else at a past date, and deduces his own title from that of the latter person by a series of deeds, wills, and heirships. Or if his own ownership has extended over a length of time greater than that for which the law makes it necessary that title should be shown, he seeks no other root, but adduces acts of ownership done by him during the necessary period. In either case he has nothing to do with the origin of property as a subject of philosophical or prehistorical speculation, or with the usefulness of property as an institution and the desirableness of maintaining it. His investigation starts from property as already existing in as great perfection as that in which he claims it. Just in the same way, in old countries, the title

[1] "Without the historical and juristic aid of the idea of property and its application to the territory of a state, it would not have been possible for the old theorists to discover the principle of political sovereignty": Holtzendorff, vol. 2, p. 228. "The pretended right of property attributed to the sovereign is an error of past times, when states were considered as the patrimony of the prince, and alleged conquest, prescription or inheritance as titles to that pretended right. Now, the old theories which were humiliating to mankind having been eliminated, it is time to modernise our language and to eliminate the term *right of international property* attributed to the sovereign of the state": Pasquale Fiore, *Diritto Internazionale Pubblico*, 3rd edition, § 863, vol. 2, p. 108. "It is to the territorial sovereignty that belongs the exclusive rule in all the extent of its possessions. Placing one's self at that point of view, and considering only the international situation of the state, one may say that it is the owner of its territory. In fact it alone can dispose of it, and it does not admit the interference of other powers. As to the private properties situate within its limits, it exercises with regard to them all public rights, that is to say the supreme right to protect them and dispose of them, but they no way belong to it according to the principles of private law (*dominium*)": F. de Martens, *Traité de Droit International*, translated from Russian into French by Léo, vol. 1, p. 452.

of a state to its territory is not concerned with the origin or vindication of territorial sovereignty as an institution, or with the conditions of its first acquisition in any particular case. The state either pleads its own possession, where there is ground for contending that that gives a sufficient title, or by a series of cessions and successions it deduces its title from a root, found in a right of the same nature as that claimed and acknowledged to have belonged at a past time to some other state. In all this there is no difference between states of our and of different civilisations. We have already remarked that the territories of both are acknowledged to be held by titles of the same kind[1], for in fact there is no such difference between any two forms of civilisation with regard to the ideas connected with sovereignty as there is with regard to the family relations and to the criminal law and its administration. So China or Turkey may rank as well as France or Germany in a question of the title to territory, either as the root from which the title is deduced, as a party to any of the transactions through which it is deduced, or as the state to which it is finally deduced. The difference between old and new countries, to which we have alluded in restricting to the former what we have here said about the title of a state to its territory, does not lie in the direction of the contrast between western and eastern civilisations.

New countries, when we are speaking of the title to territorial sovereignty, are those in which nothing exists that is recognised as a state of international law, nothing therefore which can be quoted as a root of title. There may be tribes with which civilised powers or individuals can make agreements, the conclusion and performance of which must be subject to the universal duty of good faith. But the question for the white settler is whether there is a territory in which the pursuits of civilised life can be carried on, under a sovereign power sufficiently understanding those pursuits and sufficiently organised to be capable of giving them the necessary protection, and of administering justice in the questions arising out of them. Or at least whether there is a sovereign power which can do this

[1] Above, p. 40.

in conjunction with consuls accredited to it and whose authority is normally supported by it, as happens in states like Turkey or China. If there is either the one or the other, the country contains a power with which relations are possible, based not merely on good faith but on the specific principles of international law. If there is not, the country is a new one, states and territories have to be established in it, and the question of title in it will involve what in old countries it does not, the consideration of the origin of territorial sovereignty.

That ever since the discovery of America there have been countries which the Christian powers of Europe have regarded as new in this sense, and that that fact brought with it the necessity of considering title from a new point of view, is matter of history of which no better account can be given than that given by Chief Justice Marshall, in delivering the opinion of the Supreme Court of the United States in the case of *Johnson* v. *Mc Intosh* in 1823:

"The potentates of the old world," he said, "found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilisation and Christianity in exchange for unlimited independence. But as they were all in pursuit of nearly the same object it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition which they all asserted should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which by others all assented. Those relations which were to exist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them. In the establishment of these relations the rights of the original inhabitants were in no instance entirely disregarded, but were necessarily to a considerable extent impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it and to use it according to their own discretion; but their rights to complete sovereignty as independent nations were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they pleased

was denied by the original fundamental principle that discovery gave exclusive title to those who made it[1]."

What is said in the above extract about the title by discovery will be developed later; for the present we will pass from the earliest to the latest practice, as equally proving that in new countries the question of the origin of territorial sovereignty is raised, and must be answered on principles agreed on by the civilised states which claim that sovereignty. When the African Conference of Berlin was laying down the conditions for the appropriation by the signatory powers of territory on the coasts of that continent, Mr Kasson, the plenipotentiary of the United States, declared that "his government would gladly adhere to a more extended rule, to be based on a principle which should aim at the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression[2]." The conference took no action on this invitation, and in answer to another desire expressed by Mr Kasson—that since an occupation might be rendered effective by unjust acts of violence, it should be reserved for the respective signatory powers to determine the conditions of an occupation from the point of view of right as well as of fact before recognising it as valid—it was merely recorded that, in the unanimous opinion of the conference, its Act "did not limit the right which the powers possessed of causing the recognition of the occupations which might be notified to them to be preceded by such an examination as they might consider necessary[3]." It can scarcely be doubted that in this the conference acted as best suited the interests of the natives. Whether the ideas of a tribe permit soil occupied or claimed by them to be ceded, and by what tribal authorities the cession ought to be made if permitted at all, are usually obscure questions. So also are the questions whether a proposed cession has been fully explained to the tribe and fair value given for it, and on which side lay the blame of aggression in the conflicts there may have been between the

[1] 8 Wheaton's Supreme Court Reports (21 U.S.), pp. 573, 574.

[2] Protocol of 31 January 1885: Parliamentary Paper c. 4361, p. 209.

[3] See the remarks of Herr Busch, the German Under-Secretary of State for Foreign Affairs, who was presiding. *Ibid.*

natives and the new comers. These are excellent materials for criticising an acquisition made by a rival power, and to introduce them normally into the title of civilised states to regions in new countries would have a tendency to provoke contests from which the natives would be the greatest sufferers. Extreme cases of injustice to indigenous races are provided for by the right of the civilised powers, which we have seen was recognised, to examine the source of occupations notified to them when deemed necessary. But in ordinary cases it must be remembered that as soon as attention has been drawn to any new part of the world white men will flock into it for trade, for agricultural or pastoral settlement, or for mines—that the natives themselves can be protected against the license of immigrants only by the establishment over them of a white government, alone capable of ensuring obedience—and that the ignorant and helpless natives are the more likely to receive the consideration due to them from a white government, the freer is the position of the latter from insecurity and vexation by rivals.

Prescription.

The cessions and successions, by which in old countries the title to territorial sovereignty is deduced from an assumed root of the same nature as the sovereignty to be shown, may be discussed under their respective heads, as those of treaties and conquest, but nothing general can be said about them. On the other hand the question of prescription as an admissible element of international title requires notice. We do not here refer to immemorial possession in the true sense of that term, that is a possession than which no earlier state of things is known, for in that case the possibility of an adverse title is excluded, seeing that such a title if it existed would have to be founded on an earlier state of things. We refer to the rules which in the law of a given country fix a certain lapse of time either for acquisitive prescription or usucapion, that is for transmuting possession acquired in good faith into property, or for prescription properly so called, that is for barring claims against a possessor. And the question arises whether any similar rules exist between

states with relation to territorial sovereignty. It may be said at once that there has never been any international agreement, either express or tacit, by which such a lapse of time has been fixed; but on the other hand it has seldom been doubted that the disturbance of long possession by stale claims would be more noxious between states than between private persons, on account of the want of a judicature supported by organised force, and that therefore time must be admitted as having in international right a true though undefined operation. Hence the existence of prescription in international law has been denied or asserted, as the particular author has been more impressed by the difficulty of calling any rule a law which is wanting in exact definition, or by the difficulty of refusing the name of law to a principle constantly acted on with general approval. The principle was based by Grotius and Vattel, as by most writers on natural law, on the presumed abandonment by the former sovereign or owner of a claim with regard to which he has not given due warning of his intention to keep it alive. Both however appear to have felt that the peace of the world would not be sufficiently protected by a presumption which, whenever the occasion arises for urging it, is encountered by the fact that the claim presumed to have been abandoned is actually made—which, even in theory, would allow a claim to be kept alive indefinitely by mere protest—and which at best would allow excuses, not easily appreciable at their true value, to be put forward for not having effectively made the claim earlier. Grotius seems to lean towards a time limit of, speaking roughly, a century, as being that of the memory of one generation and of the activity of three generations[1]. But this suggestion has not been followed. Vattel required a very long possession, neither interrupted nor contested, and the context may indicate that by the latter term he meant something more than not protested against[2]. If so, he seems to have carried the matter as far as it is possible to carry it.

For the rest, such a doctrine of prescription as is possible in international law has no room for application in a part of the

[1] *De Jure Belli ac Pacis*, 2, 4, 7.
[2] *Le droit des Gens*, liv, 2, § 149.

world like modern Europe, in which the state of possession is always regulated by treaty or by the juridical effect of conquest. But we shall see later that there is room for it in new countries, where it has often been questioned whether the abandonment of a right never matured by effective occupation must not be conclusively presumed, and even whether the abandonment of effective occupations, from which the states which have made them have afterwards practically withdrawn, must not be presumed. The connection which we shall see that the question of title in new countries had with the theory of possession in Roman law makes it important to remark that in that law the intention to give up possession might be inferred from mere negligence[1].

Papal Grants: Title by Discovery.

At the commencement of the great age of African and American discovery the popes still claimed to be masters of the world by divine right, and especially of all islands by the forged donation of Constantine. By a bull of 1454 Nicholas V granted to King Alfonso V of Portugal the discoveries made and to be made on the west coast of Africa, and by one of 4 May 1493 Alexander VI granted to Ferdinand and Isabella, and to their successors kings of Castile and Leon, all land further west than a line drawn from north to south a hundred leagues west of the Azores of which no Christian power had taken possession before Christmas Day 1492, the lands to the east of that line to belong to Portugal. By another bull of 25 September in the same year the pope, superseding that arrangement, opened the entire field

[1] Savigny on *Possession*, pp. 270–2 of the English translation. Note however the teaching of Savigny that a physical relation to the thing claimed to be possessed, which would not have sufficed to establish that possession of it had been in fact acquired, may be sufficient for retaining a possession once acquired, since the continuance of possession depends on the constant power to reproduce the physical relation at will: *ib.* p. 171. Thus the Portuguese title to the southern coast of Delagoa Bay, which was within easy reach of the permanent Portuguese settlement on the same bay, was adjudged by Marshal Macmahon as arbitrator to have been kept alive by intermittent acts of sovereignty, notwithstanding that the natives professed to be independent and acted as such at the time of the British occupation in 1823: see Hall, § 34, p. 122.

of oceanic enterprise to both nations, the Spaniards however to sail only westward and not infringe the African monopoly of the Portuguese[1]. But in 1494 the sovereigns of Spain and Portugal, by the treaty of Tordesillas, fixed their mutual limit at a line drawn 370 leagues west of the Cape Verde Islands, and in 1506 pope Julius II confirmed that treaty. It is superfluous to remark that as soon as Protestant states arose such papal grants could not be pleaded against them: even at the time when the grants were made Catholic powers were far from admitting as conclusive authority the power which they thought it best to conciliate for what it was worth. Ferdinand and Isabella, in the petition to which the bull of May 1493 was a response, put on record that learned jurisconsults were of opinion that no confirmation of their rights was necessary, and that they addressed themselves to the pope only in order to give proof of their deference and obedience to him[2]. Henry VII of England, in the letters patent which he granted to John Cabot and his sons on 5 May 1496, empowered his grantees to navigate the eastern, western and northern seas, and "to find, discover and search out all islands, countries, regions and provinces of gentiles and infidels, situate in any part of the world, which were unknown to all Christians before these times." They were to set up the royal standard there and to hold their conquests as vassals and lieutenants of the king, who reserved to himself only the sovereignty and a fifth of the profit[3]. Thus he disregarded the bulls, though respecting the prior rights which the Spaniards had acquired in the southern seas by their own activity. Francis I acted with equal independence, claiming under the name of New France the coast from Florida to an indefinite distance northward; and there was thus on all sides a reference to some purely secular mode of the original acquisition of sovereignty in new countries. This was the title by discovery, which at first all agreed in vaguely proclaiming, but about which, as soon as the development of events made it necessary to give it a precise form, differences arose with regard to the

[1] E. J. Payne, in the *Cambridge Modern History*, vol. 1, p. 23.

[2] Nys, *Les Origines du Droit International*, p. 371.

[3] Nys, u.s., p. 368; quoting Rymer's *Foedera*, vol. 5, part 4, p. 89.

necessity of completing it by effective occupation. Such as it was, the ideas of the age required it to be found in Roman law, by which, as being "written reason" and therefore of universal obligation, the princes between whom the disputes arose were bound as well as private individuals. And it had to be found especially in that part of Roman law which the Roman jurists had described as the law of nature, because princes over whom there was no superior lived in a state of nature as towards one another[1]. It will therefore be well to give in the first place an account of the relevant Roman law, both as it was and as in the erroneous conception then prevalent it was thought to be, in order that the reader may understand the mental atmosphere in which the disputes about the relative importance of discovery and effective occupation were carried on.

The Roman Law of Occupation and Possession.

The Roman law invoked was in the last analysis that which declared occupation to be the natural mode of acquiring property in *res nullius*, things in no one's ownership: *quod nullius est, id ratione naturali occupanti conceditur*[2]. This was necessarily a law on the acquisition of property and not on that of sovereignty: the sovereignty of Rome is assumed in the *Corpus Juris*, as that of every state is assumed in its own legislation. That however did not matter, for since it was agreed that the heathen savages were of no account it followed that in the countries inhabited by them sovereignty and property were to be acquired by the Christian princes together, and the property to be enjoyed by Christian settlers would be carved by the grant of their sovereign out of that which belonged to him as the first occupant[3]. A greater difficulty lay in this, that as the soil of the empire was already parcelled out among proprietors, including the state for those parcels of which it had the property as well as the

[1] *Jus etiam illis perscriptum libris Justiniani non civitatis est tantum sed et gentium et naturæ....Ergo et principibus stat, etsi est privatis conditum a Justiniano:* Albericus Gentilis *de Jure Belli*, l. 1, c. 3; Holland's edition, p. 16.

[2] Gaius, in Dig. 41. 1, 3.

[3] See the quotation from Grotius on p. 87.

sovereignty, the Roman lawyers scarcely thought of anything except movables as the subject of acquisition by occupation[1], and the occupation of a movable does not give occasion for those questions, which proved to be so thorny, relating to the geographical extent to which the legal consequences of what is done at a particular point may reach. The gap thus left might however be filled by reference to the theory of possession, which, as a right distinct from that of property, was the subject of careful protection by Roman law in the case of immovables as well as in that of movables. Occupation might be regarded as a *naturalis possessio*, on which the right of property followed because, in the case of what had been a *res nullius* until the first possessor set foot on it, there could be no better title than that of the first possessor to oppose to him. Indeed this had been observed by the Romans themselves: *dominium rerum ex naturali possessione cœpisse Nerva filius ait*[2]. And so it was practically the Roman rules on possession, or what were believed to be such, that were held to govern the case of discovery.

Now the theory of possession was that it required both a bodily act and a mental attitude: *apiscimur possessionem corpore et animo, neque per se animo aut per se corpore*[3]. The necessary bodily act was prehension; such a seizure as to give the mastery over the thing, including the power of retaining it, without which there would not be mastery: *non videtur possessionem adeptus is qui ita nactus est ut eam retinere non possit*[4]. This, where the possession of an immovable is peaceably transferred to a purchaser or donee, does not always require that he or his agent shall perambulate every part of it. If the intention of the parties refers to a known unit of moderate size, as a farm or a house, and there is no obstacle to that intention being carried into effect at any moment by the party let into possession, the

[1] It is true that among the things capable of a *naturalis possessio* giving *dominium* Paulus mentions an island arising in the sea: Dig. 41, 2, 1. But this is an exception which proves the rule.

[2] Thus Paulus, in Dig. 41, 2, 1. The reader will do well to note that this title of the Digest is headed *de adquirenda vel amittenda possessione*, the previous title (41, 1) being *de adquirendo rerum dominio*.

[3] Paulus, in Dig. 41, 2, 3.

[4] Javolenus, in Dig. 41, 2, 22.

transfer may take place at one point with effect as to the whole[1]. But if the unit, although known, is so large that a physical power of dealing with the whole and excluding others from it cannot be contemplated as resulting to the transferee from the act of induction, as if the intention is to transfer the possession of a great estate but the induction takes place at only one of the farms composing it, then it was never held either in Roman or in feudal law that livery of seisin of that farm could be livery of seisin of the whole estate[2]. Still less if possible, where a discoverer enters on land regarded as a *res nullius*, a supposition which negatives the possibility that the unit on which he enters can be ascertained by a concert of intention between him and the previous possessor, would the Roman theory extend the possession acquired by him beyond the limits which he can control from the position which he actually takes up.

The mental attitude required by the Roman theory for the acquisition of possession was the intention to possess. Applied by analogy to the acquisition of property by occupation, it is the intention of ownership, the *animus rem sibi habendi.* On this however a misunderstanding existed in the age of the renaissance and long afterwards, indeed until it was finally dispelled by Savigny[3]. It was thought that the *animus* included

[1] *Quod autem diximus, et corpore et animo adquirere nos debere possessionem, non utique ita accipiendum est ut qui fundum possidere velit omnes glebas circumambulet, sed sufficit quamlibet partem ejus fundi introire, dum mente et cogitatione hac sit uti totum fundum usque ad terminum velit possidere:* Paulus, in Dig. 41, 2, 3.

[2] Savigny on *Possession,* book 2, section 19; pp. 173–4 of the English translation.

[3] Savigny held that the *animus* required for possession was the intention of ownership, for which modern jurists commonly use the term *animus domini,* not found in the ancient texts. Jhering held it to be only the intention of keeping the thing, but Karlowa makes it to be the intention of possessing, which he distinguishes from the intention of keeping by its including the will to deal with the substance of the thing, at least in certain eventualities, and not merely to use it without affecting its substance. Thus the later authorities, while distinguishing the *animus* necessary for possession from that of ownership, which must certainly be present in occupation, agree with Savigny in referring the *animus* in all cases to the nature of the right or position intended to be acquired, and not to its extent in space. The work of Savigny, in dispelling the notion that

the intention of the acquirer as directed to a larger or smaller extent of space, so as to govern the operation of the possession taken at a given point. This was not only without warrant from the texts; it conflicted with them with regard both to occupation and the corporal element of possession. Considered with regard to the rules about possession, it set aside the necessity that the acquirer should have the physical mastery of the thing to be possessed, or at least that such mastery should be capable of being contemplated as the immediate consequence of his acquisition. Considered with regard to the natural acquisition of property, it substituted for a real occupation a symbolical occupation of a province or of a continent, effected at a certain point, and being in the last analysis nothing more as to all other points than an intention to occupy at some future time.

Titles by Discovery and by Effective Occupation.

We are now in a position to appreciate the title by discovery put forward at the opening of the great age of discovery. First, it was not imagined that any title could be gained by a discovery made by subjects without authority from their governments. The title, though for shortness it might be spoken of as one by discovery, was always understood to be one by discovery and occupation, and occupation, with the consequent acquisition of dominion, could in the nature of things be only the act of a state. But if a private uncommissioned discoverer professed to acquire for his state, a ratification by it before another power had stepped in would be in time[1]. These principles occasioned little or no difficulty in the fifteenth and sixteenth centuries, when explorers, even though not belonging to the regular service of their countries, were usually furnished with letters

it could be of the latter character, with the consequence of an act having legal effect for an area with a view to which it is symbolically performed at a point, does not seem to have been attacked by his critics.

[1] *Possessionem adquirimus et animo et corpore, animo utique nostro, corpore vel nostro vel alieno:* Paulus, *Sententiarum* lib. 5, tit. 2. The principle that *omnis ratihabitio retrotrahitur et mandato aequiparatur* carries the *animus noster* back to the *corpus alienum.*

patent or some other authority *ad hoc.* But the United States in the Oregon dispute with Great Britain ran counter to them in founding their claim on the discovery of the mouth of the Columbia River by a private adventurer, Captain Gray, followed by an establishment which one of their citizens, Mr Astor, made on that river, although up to the time when Astoria was sold to the British Northwest Company their government had not adopted the discovery, and had returned no answer to the letter by which Mr Astor had requested it to authorise his proceedings. The British negotiators did not admit the claim, and the region was divided by the treaty of 1846. There is however no serious doubt about the principles. On the one hand a government will gain no title from the discoveries made even by its own expedition, sent out with no other avowed object than that of scientific research[1]; and on the other hand the advance of European states in Africa is usually made at the present day by following, and so far as sovereignty is concerned adopting, the establishments made by their subjects beyond their frontiers.

Secondly, besides the requirement of state authority there was that of publicity. "In newly discovered countries," Lord Stowell said, "where a title is meant to be established for the first time, some act of possession is usually done and proclaimed as a notification of the fact[2]." Notification is here to be understood in the general sense of making known, and not in the special sense of an express communication to other powers in which it is used in the general act of the African Conference

[1] 2 Holtzendorff, pp. 258–9; where the learned author says that "even the sending of missionaries to convert the natives, on which the Spanish government founded in the controversy about the Caroline Islands, can no longer be considered as an act of occupation, because it was the church that sent them." "The discoverer must either in the first instance be fortified by the public authority and by a commission from the state of which he is a member, or his discovery must be subsequently adopted by that state:" Phillimore, *International Law*, vol. 1, § 227. "*Il est nécessaire que l'occupation ait lieu au nom et avec l'assentiment d'un gouvernement...L'occupation entreprise par des particuliers doit être sanctionnée par le gouvernement au profit duquel elle a été accomplie:*" F. de Martens, French translation, vol. 1, p. 463.

[2] In *The Fama*, 5 C. Robinson 115.

of Berlin. If the discovery was made in a spirit of occupation and by an authority competent for that end, the facts would soon be known through the reports of the voyage which ran round the world. If it was made by private and unauthorised mariners, its adoption by their government would generally be accompanied by some public act like the erection of a fort. But whatever the means by which publicity was effected, it was never thought that either discovery or appropriation could be kept secret and the benefit of it retained.

These two points being premised, which it would be unfair to suppose were not assumed even where discovery alone was mentioned, we come to the points of divergence. The Spaniards —possibly only because they were the first comers in America— carried extremely far the claim to have occupied vast tracts of territory by the representative effect of acts done at certain points[1]. No geographical conception seemed to them too large to be embraced as a unit by the *animus* of an occupant. Thus Venezuela, maintaining old Spanish pretensions in the arbitration between her and England in 1899, put forward the whole of Guiana, bounded by the Orinoco, the Casiquiare, the Amazons and the sea, as a unit to every part of which the effect of occupation at any point of it extended. And this exaggeration of the scope of the mental attitude entering into occupation at the expense of the corporal act led, naturally, to reducing the latter to a merely ceremonial one. To read a proclamation, plant a flag, perhaps make some mark on a rock, and sail away without building a fort or leaving any other embodiment of power, was represented as taking possession. Such claims the English and other later comers on the scene could not and did not admit. It is true that behind the pretensions there lay a kernel of substance, but it was of a political and not a legal character. Where the king of Spain or any other sovereign built a fort or founded a settlement, the legal doctrine would measure his right in space by the area which the force existing there would enable him to rule from it. Within that range alone could his occupa-

[1] The view is expressed by Pufendorff, though with more moderation. *Occupatio rerum soli*, he says, takes place *pedibus, cum intentione culturam iisdem adhibendi, ac constitutis limitibus vel exacte vel cum aliqua latitudine:* 4, 6, 8.

tion be strictly called real or effective. But a fort or a settlement may not only be a seat of actual rule but a centre for the extension of that rule; and while the sovereign cannot fairly by delaying such extension exclude the rest of the world for an indefinite time, it would be an unfriendly act for another to step in prematurely and cut off his reasonable hopes. Thus, since sound politics cannot be ignored in international law, arose the doctrine that in new countries civilised states only gain conclusive title by effective occupation, but yet that a moderate time must be allowed for the extension of such occupation over a reasonable area round the point at which it has been commenced. This is the doctrine of effective occupation, and has usually been contrasted as such with that of title by discovery Moderate and reasonable are loose terms, as must be expected where politics mingle with law in the construction of a theory, but the theory has in its favour the great weight of authority, and is fully stated by Vattel, who says:

"Thus navigators, being on voyages of discovery with commissions from their sovereigns and meeting with islands or other desert countries, have taken possession of them in the names of their nations; and that title has generally been respected if it has been closely followed by a real possession[1]."

The same view was stated by Queen Elizabeth, with as much fulness as was required by the occasion, in her reply to Mendoza, Philip II's ambassador, who complained of the expedition of Drake.

"As," she said, "she did not acknowledge the Spaniards to have any title by donation of the bishop of Rome, so she knew no right they had to any places other than those they were in actual possession of; for that their having touched only here and there upon a coast, and given names to a few rivers or capes, were such insignificant things as could in no ways entitle them to a propriety further than in the parts where they actually settled and continued to inhabit[2]."

Nor does the position ultimately taken by Spain herself appear to have been very different. In the declaration of

[1] *Droit des Gens*, 54, 1, § 207.

[2] Camden's *Annals*, year 1580. Translated as in Twiss, *Oregon Question*, p. 161.

4th June 1790 signed by the Count de Florida Blanca and sent to all the courts of Europe during the Nootka Sound controversy, the king of Spain limited his claim in the Pacific to "the continent, islands and seas which belong to His Majesty, so far as discoveries have been made and secured to him by treaties and immemorial possession, and uniformly acquiesced in, notwithstanding some infringements by individuals who have been punished upon knowledge of their offences[1]."

It will be noticed that in stating the doctrine of effective occupation we have described it as being the only means of gaining a conclusive title. It was intended by this to leave open the question whether any steps taken short of effective occupation confer only an inchoate title, to be completed by effective occupation within a reasonable time, or may confer a full title, to be lost by presumptive abandonment if effective occupation does not follow within a reasonable time. The latter mode of statement has been the most usual on the continent, and falls in both with the old notion that title could be acquired by an intention directed to an area, and with the habit of assuming abandonment, real or presumptive, as the ground for any admission of prescription in international law[2]. Hence writers who seem to admit the title by discovery in the ancient Spanish sense must not be reckoned as practically hostile to the doctrine of effective occupation, until it is seen whether they do not reach its goal through the theory of abandonment. The other mode of statement, with the term "inchoate title" which is necessarily connected with it, has been much used by English writers, and agrees best both with Roman law as now understood, and with the discouragement of stale claims in the interest of peace which is the substantial reason for the admission in international law of some equivalent to the prescription of national laws[3].

[1] Twiss, *Oregon Question*, pp. 109, 163. The treaty meant was that of Utrecht, the terms of which were too general to support the particular Spanish claim to Nootka Sound, and the exact meaning of the declaration might be open to discussion if it was worth while.

[2] See above, p. 93.

[3] Perhaps prescription in international law, whether grounded on constructive abandonment or otherwise, was never more broadly denied,

Modern Views: Arts. 34 *and* 35 *of Berlin.*

The peoples of European blood made during the nineteenth century, and especially during the second half of it, an advance in their knowledge of the globe comparable to that which they made during the fifteenth and sixteenth centuries, but the earlier period was the age of discovery, the later that of exploration.

or the denial accompanied by a more rigorous specific application, than by the United States of America during their disputes with Spain as to the boundary between Louisiana and Mexico on the coast of the Gulf, and with England as to their northwestern boundary. Their negotiators—Pinckney and Monroe on 20 April 1805 and J. Q Adams on 12 March 1820—laid down three principles, the first and second of which embodied the doctrines of watershed and middle distance, and the third was thus expressed: "That whenever any European nation has thus acquired a right to any portion of territory on that [the American] continent, that right can never be diminished or affected by any other power, by virtue of purchases made, by grants, or conquests of the natives within the limits described." The case on the Gulf was this. La Salle, sent out by the French government to make a permanent settlement, built a fort in 1685 in a bay called by him that of St Louis, now known as the bay either of Espiritù Santo or of Matagorda: it is not certain which, and it is immaterial, they are so near one another. The Indians massacred the garrison in 1689, and the French made no attempt to recover the spot. In 1690 the Spaniards founded a settlement in Espiritù Bay, and from that point eastward to the delta of the Mississippi there was on the coast no settlement of either nation, and in the interior the most advanced Spanish and French posts were respectively at Adaes and Natchitoches, nearer to the Mississippi than to Espiritù Bay, until Spain got possession of Louisiana in 1769, under the cession which France had agreed to make in 1762. After certain intermediate transactions Louisiana was transferred to the United States in 1803, and they then claimed that France had never lost the sovereignty of the spot where La Salle had built his post; that that fort gave to France the coast as far west as the Rio Grande, being the middle distance to the then nearest Spanish settlement on that side; that the subsequent Spanish settlements, which by 1803 reached in a compact line to Espiritù Bay, were unlawful encroachments; and that the Rio Grande was therefore the true boundary between the United States and Spain. But the treaty of 1819 between the two powers fixed their boundary at the river Sabine, nearly where the line between the French and Spanish posts had been before 1769. See Twiss's *Oregon Question examined.*

Coast lines were sighted and mapped in the one, the interiors of continents have been laid bare in the other. The former process detects the unknown, the latter brings the vague into clearness. The processes differ in their effects bearing on international law. The mouth of a river is a point to be fortified, and geographical conceptions cluster round it; the route of a traveller leaves no more mark than the track of a ship, and one cattle or sheep farm is very like another as the possible centre of a district. Hence exploration lends itself less easily than discovery to those legal ideas which connected sovereignty with occupation in the Roman or what was believed to be the Roman sense. On the other hand, as the settler is not long in following the explorer even if he is not himself the explorer, exploration is in closer contact with the political ideas which arise on the presence of white men in the midst of native tribes. That civilised states should assume sovereignty over new but not uninhabited countries, on a system which they arrange among themselves without reference to the natives, can only be justified by the necessity of a government where whites and natives meet, and by the inability of the latter to supply a government adequate to the white men's needs or to their own protection. Accordingly the modern tendency of thought is to place the original acquisition of title to sovereignty squarely on this basis, and so to furnish the doctrine of effective occupation with a new and solid support. "No state," says Holtzendorff, "can appropriate more territory through an act of occupation than it can regularly govern in time of peace with its effective means on the spot[1]."

The rules which the African Conference of Berlin laid down in Articles 34 and 35 of its General Act, though limited in their expression to the acquisition of territory on the coast of Africa, embody the shape which the law as to the original acquisition of title has taken under the influence of these views. Few doubt that their principles are applicable generally, and indeed Sir Edward Malet, the British representative, expressed at the conference the desire that they should be declared for the whole of the African continent, but it was thought more con-

[1] *Handbuch des Völkerrechts*, vol. 2, p. 263.

venient on that occasion to declare them only for the limits mentioned. They are as follows:

"Art. 34. Any power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which being hitherto without such possessions shall acquire them, as well as a power which assumes a protectorate there, shall accompany the respective act with a notification thereof addressed to the other signatory powers of the present act, in order to enable them if need be to make good any claims of their own.

"Art. 35. The signatory powers of the present act recognise the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent, sufficient to protect existing rights and, as the case may be, freedom of trade and of transit under the conditions agreed upon."

The first of these articles refers, among other protectorates, to the colonial ones which have been mentioned above[1] and will be treated more fully in the next chapter. Postponing their consideration, we observe that the article substitutes an express notification for the less precise requirement of publicity to which we have seen that new acquisitions were always subject. And by declaring that the object is to enable adverse claims to be made good it does more, for unless the area over which the new claim extends is in some degree specified it cannot be known what other claims are adverse to it. Accordingly the commission at Berlin which reported on the draft articles which, as amended, became Arts. 34 and 35, although it did not accept Sir Edward Malet's proposal that the notification should always contain an approximate determination of the limits of the territory occupied or protected, yet placed on record that "it remained understood that the notification was inseparable from a certain determination of limits, and that the powers interested could always demand such supplementary information as might appear to them indispensable for the protection of their rights and interests[2]." Thus the difficult geographical questions about the extent to be attributed to an occupation are swept away as to boundaries on the coast and much reduced in importance as to inland regions, where however, since landmarks are less easy

[1] p. 24.

[2] Annex 1 to Protocol no. 8.

to find, some difficulty may still occasionally remain even where the occupation of the interior depends on that of the coast.

The second of the above articles requires the establishment of an authority which may protect the natives with whom contact has become inevitable, and under which the civil rights essential to European or American life may be enjoyed in tranquillity The "existing rights" mentioned cannot include less than this. Because a native tribe is unable to supply a government suited to white men, and therefore cannot be credited with sovereignty, it does not follow that it is not to be credited with rights of a simpler kind. Property is within the range of native intelligence, and at the moment when white sovereignty is acquired property may be held by natives or by whites to whom they have transferred it with full knowledge of what they were doing, or whites may have acquired it in uninhabited places by enterprise and industry of the fruits of which it would be an outrage for any government established later to deprive them. All such rights would be "existing" within the meaning of Art. 35, and the area which they covered would have to be excluded from that in which, using the expression of Grotius[1], sovereignty and property are acquired at one blow. The requirement that the authority to be established shall be "sufficient to protect, as the case may be, freedom of trade and of transit under the conditions agreed upon," refers to the special stipulations made by the conference for the Congo Basin, but appears to be sufficient to include any further stipulations to which a given power may have consented in any case. The nature of the functions to be performed in this respect is an additional indication that nothing less than a regular government was contemplated as the contribution to be made

[1] For Grotius, see above, p. 87. The first draft of Art. 35 mentioned private acquired rights, on which the commission observed: *Quels sont les droits acquis qu'il faut faire respecter? Le comité a proposé de placer le mot 'privés' entre ces termes. D'après son interprétation, il s'agit de droits civils, et ceux-ci doivent être sauvegardés à quelque époque qu'ils aient été acquis, avant comme après l'occupation. La commission, en approuvant le commentaire, n'a pas considéré l'intercalation comme indispensable pour déterminer le sens de la disposition.* Annex 1 to Protocol no. 8.

by a state to the general interest, in return for the permission to appropriate dominion to itself.

Such being the obligations attaching to occupation, the sufficiency of the occupation must be measured by their fulfilment. If a state claiming sovereignty by occupation should fail to establish the necessary authority, no other state can be bound to overlook the injury which may be thereby caused to its own subjects being in the country or afterwards entering it, or the inhumanity to the natives which must inevitably result. But exploration commonly begins through private enterprise, sooner or later recognised and supported by the state to which the adventurers belong, so that the development of public authority in the occupied region can only be gradual, and there will usually be an interval during which the fulfilment of the conditions for the acquisition of sovereignty will be more or less in suspense[1]. In short, the doctrine of effective occupation cannot be presented in any form without raising the question which we, in common with most English writers, think is best answered by the doctrine of inchoate title. The ripening of an inchoate title into a complete one, in other words the more or less gradual steps to be taken in fulfilment of the obligation measured by Art. 35 of Berlin, will always call for wise discretion. As we have said elsewhere, "we should certainly be going too far if we said that authority must always be present when its action is required. Even in old countries the means of restoring order and punishing its breach are by no means always ready on the spot where a crime has been committed or a right has been violated, and the rights conferred by an inchoate title would be reduced to very small proportions if other states were allowed to enter the region and set up their

[1] Baron Lambermont said at Berlin that *l'occupation ne saurait être vraiment effective au moment même de la prise de possession : elle ne le deviendra que plus tard, par l'accomplissement de conditions qui impliquent une idée de continuité et de permanence. On ne peut donc rien reconnaître ni contester à cet égard au lendemain de la notification.* Accordingly the commission struck out from the draft of Art. 34 words which would have made it the object of the notification that the signatory powers should be enabled *either to recognise the occupation as effective or* to make good any claims of their own. *Ib.*

own sovereignty at every point where their traders may have suffered a momentary injury[1]. Common sense points out that much must depend on the nature and rapidity of the stream of emigration or of enterprise which is directed to the region. The crowds which flock to new gold-diggings must be speedily provided with a government if it is wished to maintain the pretension to the sovereignty of the country. Pastoral settlements scattered over a vast area may be followed more slowly by a regular administration. What is above all necessary both for the theorist and the statesman is to bear well in mind that no title can prevail against the substantial non-fulfilment of the duties attached to it, not even if the notification required by the Conference of Berlin has been made and has not met with any objection from the powers which have received it[2]." Dr Geffcken said in 1888:

"It is a very doubtful question whether the Congo State can rightfully claim the sovereignty over a territory of more than 2,000,000 square kilometres with 40,000,000 inhabitants, extending in part over regions entirely unexplored and certainly not yet reduced into possession, even though its right to those limits has been acknowledged by other states. These regions will only become the territory of the Congo State in proportion as they are occupied by it[3]."

This seems to us to have been a sound opinion.

It is worth while noting the following testimonies rendered to the necessity of effective occupation by important writers not later than the middle of the nineteenth century.

[1] *Dans des contrées occupées parfois depuis peu et souvent lointaines, la paix peut se trouver exposée à des vicissitudes que l'autorité ne saurait toujours conjurer. Des troubles qui ne seraient pas réprimés sur l'heure, autoriseraient-ils des tiers à mettre les droits de l'occupant en question? Une garantie suffisante réside dans l'obligation de faire respecter les droits acquis, qui comprennent les personnes et les choses.* Baron Lambermont, *ib.*

[2] *Chapters on the Principles of International Law,* p. 165.

[3] Hefter's *Europäisches Völkerrecht der Gegenwart,* 8th ed. by Geffcken, p. 159.

GROTIUS. "Quin et ipsa naturalis ratio, et legum diserta verba et eruditiorum interpretatio, manifeste ostendit ad titulum domini parandum eam demum sufficere inventionem quae cum possessione conjuncta est, ubi scilicet res mobiles apprehenduntur aut immobiles terminis atque custodia sepiuntur, quod in hac specie dici nullo modo potest, nam praesidia illic Lusitani nulla habent." *Mare Liberum*, c. 2.

BYNKERSHOEK. "Ultra detentionem corporalem dominium non extendi nisi ex conventione.....solam legem civitatis dominia rerum defendere etiam sine possessione corporali." *De Dominio Maris*, c. 1, *conspectus*. This view having been attacked by Thomasius and others, he explains in his *Opera omnia* that "praeter animum possessionem desidero, sed qualemcunque, quae probet me nec corpore desiisse possidere."

VATTEL. See the quotation on p. 102, above.

GÜNTHER. "Um das eigenthum dergleichen länder, es sei auf welche art es wolle, zu erlangen, ist es nicht hinlänglich sie entdeckt zu haben oder blos die absicht der bemächtigung an den tag zu legen. Sie müssen auf vorerwähnte weise im besitz genommen werden." *Völkerrecht in Friedenszeiten*, 1792, v. 2, p. 11.

KLÜBER. "L'occupation d'une partie inhabitée et sans maître du globe de la terre ne peut donc s'étendre que sur les territoires dont la prise de possession effective, dans l'intention de s'attribuer la propriété, est constante." *Droit des Gens modernes de l'Europe*, 1819, § 126.

WHEATON. "The exclusive right of every independent state to its territory and other property is founded upon the title originally acquired by occupancy, conquest or cession, and subsequently confirmed by the presumption arising from the lapse of time, or by treaties and other compacts with foreign states." *Elements of International Law*, 1836, § 161. In § 165 Wheaton contrasts the title derived in Europe from conquest and confirmed by long possession and international compacts, with the claim derived in America from discovery, conquest or colonisation, and since confirmed by compact. Evidently he did not put discovery alone as high as a title.

ORTOLAN, Eugène. "Une prise de possession nominale, un signe ou un indice quelconque de souveraineté, ne suffisent pas....Il faut joindre à l'intention...une possession effective, c'est-à-dire qu'il faut avoir le pays à sa disposition et y avoir fait des travaux qui constituent un établissement." *Des Moyens d'acquérir le Domaine International*, 1851, § 73.

The present state of opinion on the subject might be proved from numerous writers of recognised value, but may be summed up by quoting the declaration adopted by the Institute of International Law at Lausanne in 1888.

Projet de Déclaration Internationale relative aux Occupations de Territoires. Art. 1. L'occupation d'un territoire à titre de souveraineté ne pourra être reconnue comme effective que si elle réunit les conditions suivantes.

1°. La prise de possession d'un territoire enfermé dans certaines limites, faite au nom du gouvernement;

2°. La notification officielle de la prise de possession.

La prise de possession s'accomplit par l'établissement d'un pouvoir local responsable, pourvu de moyens suffisants pour maintenir l'ordre et pour assurer l'exercice régulier de son autorité dans les limites du territoire occupé. Ces moyens pourront être empruntés à des institutions existantes dans le pays occupé.

La notification de la prise de possession se fait soit par la publication dans la forme qui dans chaque état est en usage pour la notification des actes officielles, soit par la voie diplomatique. Elle contiendra la détermination approximative des limites du territoire occupé. *Annuaire de l'Institut de Droit International,* v. 10, p. 201; *Tableau Général de l'I. de D. I.,* p. 145.

Subsidiary arguments of Title: Watershed, Middle Distance, Back Country, Political Considerations.

We come now to a class of considerations occupying a prominent place among those appealed to in the historical controversies about the title to territory in new countries, the connection of which with those we have already studied must be explained generically before we enter on any of them in particular. When discovery and occupation at a point were claimed to give a title to a large area for which such occupation was supposed to have a representative effect, it was an obvious idea to use geographical arguments in support of the representative character asserted, arguments tending to show that the area claimed was a natural unit of which possession might be acquired at a point, just as the purchaser of a farm may receive livery of seisin at the entrance to it. Again, when an inchoate title was claimed to an area larger than that of the actual occupation, it was an obvious idea to fortify that title, political in its substance, by political arguments tending to show that the area claimed was that which for the purposes of government would properly or most conveniently be connected with the occupied part. Under the Berlin principles there will be little room for arguments of either kind, because the limits of the intended

acquisition will have been notified with some degree of precision and discussed at once if thought exorbitant, nor on the general modern principle will any arguments prevail against a failure to establish a sufficient authority by the time that it is required. Not much is therefore likely to be heard in future of the class of considerations referred to, but they must be noticed for their historical interest, and because their usefulness is not even now absolutely excluded. Titles must be judged by the state of international law at the time when, if at all, they arose[1]; and again, a notified limit to which no objection was made may be shown by later surveys to be so badly described as to be incapable of identification on the spot, while the colonisation of different states may be advancing towards it from respective sides.

Among the geographical arguments the two which have played the greatest part in history are those of watershed and middle distance. They were laid down as follows by the negotiators of the United States in the disputes between that power on the one hand and first Spain and afterwards Great Britain on the other hand, during the first half of the nineteenth century.

"That whenever any European nation takes possession of any extent of sea coast, that possession is understood as extending into the interior

[1] This principle, about which there can be no dispute, was invoked by Venezuela in the arbitration with Great Britain about the Guiana boundary. It is worth while to notice that in the cases of the *Cape Horn Pigeon* and three other vessels, belonging to United States citizens and molested by Russian ships of war on the charge of sealing in Russian waters, M. Asser, arbitrator, by his sentences in all the cases dated 29 November 1902, after reciting that according to the declarations exchanged between the two governments he was to decide by the general principles of the law of nations and the spirit of the international agreements applicable to the matter, proceeds thus: *qu'ensuite il a été reconnu que cette stipulation n'aura aucune force rétroactive, et que l'arbitre appliquera aux cas en litige les principes du droit des gens et les traités internationaux qui étaient en vigueur et obligatoires pour les parties impliquées dans ce litige, au moment où la saisie des navires a eu lieu. Revue de D I. et de L. C.*, 2e série, tome 5, pp. 76, 80, 86, 93. There was no question in these cases of any change in a rule of international law, but in one of them it was necessary to exclude a treaty as inapplicable by its date: *ib.*, p. 89.

country to the sources of the rivers emptying within that coast, to all their branches and the country they cover, and to give it a right in exclusion of all other nations to the same.

"That whenever a European nation makes a discovery and takes possession of any portion of that continent, and another afterwards does the same at some distance from it, where the boundary between them is not determined by the principle above mentioned the middle distance becomes such of course[1]."

The first of these principles would lead to the conclusion that France, while she held Canada and Louisiana, was entitled to all the basins of the St Lawrence and Mississippi, the mouths of which rivers she had discovered and taken into her possession, except indeed such portions of those basins as were comprised within the settled area of the English colonies or were well understood to belong to the Spanish viceroyalty of Mexico. But during the negotiations with England in 1761 France repudiated any such claim, and proposed that the Indians "between Canada and Louisiana, as also between Virginia and Louisiana, should be considered as neutral nations, independent of the sovereignty of the two crowns, and serve as a barrier between them[2]." The United States however, when they had purchased from France the right which she had in Louisiana by discovery or otherwise, contended against Spain, which was still in contact with the Mississippi basin from the side of Mexico, that "by the discovery and possession of the Mississippi in its whole length and the coast adjoining it, the United States are entitled to the whole country dependent on that river, the waters which empty into it and their several branches, within the limits on that coast[3]." And, later, they claimed against Great Britain on the same principle the whole basin of the Columbia or Oregon river, to the mouth of which they asserted a right on the grounds which we have seen above[4]. Here the impossible magnitude of the pretensions to which the doctrine of watershed would lead was illustrated by the fact that British posts had been established on the head waters of that great river, by

[1] These were the first and second of the three principles mentioned in the note on p. 106, above.

[2] Twiss, *The Oregon Question examined*, p. 307.

[3] Twiss, quoting Messieurs Pinckney and Monroe; *ib.*, p. 248.

[4] P. 100.

adventurers crossing the mountains from the side of the Atlantic through British territory, and therefore not chargeable with having taken unfair advantage of any discoveries at its mouth. This claim was settled by a compromise in the Oregon treaty of 1846; and such has been the usual fate of watershed claims, but the principle of middle distance, where the points between which it is to be measured are not very far apart, has been more fruitful of results.

A third claim of a geographical nature is that to the back country (*hinterland* in German) to an indefinite extent behind a coast of which possession has been taken. In the charters granted by the English or British crown to many of the colonies which afterwards became the United States, their limits were defined as stretching westward from definite parts of the Atlantic coast to the Pacific, but this must be taken as intended to operate between the colonies and the crown and between adjoining colonies: no pretension of so far-reaching an extent was advanced by Great Britain against foreign states. Within more moderate limits the claim to back country is political as well as geographical, since it will usually be from the coast at the back of which it lies that that region can most easily be reached, and the state which has established its government on the coast will be acting within its right if it hinders another state from using its territory as one of transit for the purpose of setting up a possession adverse to it in the interior, and indeed a state which attempted to do so would be playing an unfriendly part. The coast state might regard itself as enjoying a sphere of interest beyond the range of its effective occupation. But it is often possible to reach an interior otherwise than from the nearest coast, and where this is so it can only be within moderate limits of space, and for a moderate duration of time in inverse proportion to the urgency of the need of protection for trade and settlement in the interior, that a sphere of interest radiating from the nearest coast will properly command international respect. Thus considered, the claim to back country has an affinity with that by continuity or contiguity, which was put forward by the United States in their controversies above referred to about their western and north-western boundaries. "It will not be denied," Mr Gallatin wrote, "that the extent of contiguous

territory to which an actual settlement gives a prior right must depend in a considerable degree on the magnitude and population of that settlement, and on the facility with which the vacant adjoining land may within a short time be occupied, settled and cultivated by such population, as compared with the probability of its being thus occupied and settled from another quarter[1]." Our observation on that argument would be that it lays too much stress on an always uncertain future, tending as it does to keep areas open indefinitely for appropriation, while the true stress lies on the presence in the areas of effective authority when required. Indeed the claim by contiguity so explained is too nearly equivalent to the "manifest destiny" invoked by popular rhetoricians.

Purely political arguments fell under the consideration of the Baron de Lambermont, in his award of 17 August 1889, between the British and German companies on the farm of the island of Lamu. The case turned on the effect in the circumstances of the acts and engagements of the Sultan of Zanzibar and his predecessor, but the eminent arbitrator laid down a principle which extends to the title to territory. "Although," he said, "considerations based on economic and administrative interests or on political convenience may throw light on the advantage or disadvantage of a solution conformable to the views of one or other party, such reasons cannot stand in place of a mode of acquisition recognised by international law[2]." But the political consideration of security cannot be ruled out like that of convenience or interest. "When," says Sir Travers Twiss, "a nation has discovered a country and notified its discovery, it is presumed to intend to take possession of the whole country within those natural boundaries which are essential to the independence and security of its settlement[3]."

[1] Twiss, *The Oregon Question examined,* p. 311: see also p. 301. Mr Calhoun, writing to Mr Pakenham on 3 September 1844, treated the grants as far as the Pacific made in the colonial charters mentioned in the text as based on the "right of continuity," and the treaty of 1763 as transferring to France the British title so arising: 1 Wharton 6, 7. But this is erroneous, for the limits described in the charters had not been made by Great Britain the subject of an international claim.

[2] 22 *Revue de D. I. et de L. C.*, p. 353.

[3] *Law of Nations, Peace,* 2nd edn, p. 205.

And the same authority says that "where the control of a district left unoccupied is necessary for the security of a state and not essential to that of another, the principle of *vicinitas* would be overruled by higher considerations, as it would interfere with the perfect enjoyment of existing rights of established domain[1]." But the consideration of security can hardly be relied on as important in the title to territory except for very small areas contiguous to real settlements.

Islands in the Sea.

We shall find that the sea is territorial water, belonging to the sovereign of the coast, whether of the mainland or of an island, for a distance from the coast which is generally taken as three nautical miles. If therefore an island lies within that distance either from the mainland or from another island, there can be no difficulty in admitting that it belongs to the sovereign of the latter, in the absence of any title to the contrary. We do not know whether there is an instance of such contrary title, but it might conceivably arise from an island having been effectively occupied before a title was acquired by any state on the opposite coast, or both the island and the opposite coast might belong to the class of old countries, the titles to them not being derived from any original root but having been handed down immemorially either by cession and succession or by unbroken enjoyment.

If an island lies entirely outside the range of territorial water measured from the mainland or from any other island, the original acquisition of title to it or to any part of it must depend on the same principle as the original acquisition of title to a part of a continent. Thus in the protocol which was signed at Madrid between England, Germany, and Spain on 7 March 1885, the two former powers recognised Spanish sovereignty over the Sulu Archipelago, including "the places effectively occupied as well as those places not yet occupied." If we regard the other stipulations of the protocol as containing the price of the recognition of Spanish sovereignty over the

[1] *The Oregon Question examined*, p. 174.

unoccupied parts of the archipelago, and the recognition of it as existing over the occupied parts as standing on its own merits, we may agree with Holtzendorff in interpreting the whole as an application of the principle of effective occupation[1]. The political arguments that may be drawn from the greater or less proximity of an island to the opposite coast cannot stand in the place of a title depending on received legal rules. They may furnish ground for political action, but even the argument founded on the security reasonably due to the opposite coast must depend too much on the circumstances to be the foundation of any positive canon. There is on record a case in which the claim to islands as dependencies of a coast was advanced to an extravagant extent. The Falkland Islands are considered to have been discovered under Spanish auspices by Amerigo Vespucci in 1502, but were first occupied by a French company of St Malo in 1764, whence their French name of Malouines. Spain claimed them as "a dependence of the South American continent," and Louis XV surrendered them on the payment by Spain of an indemnity to the company. It is said that Lord Anson, when first Lord of the Admiralty in 1754, had contemplated occupying the islands, but that the British government abandoned the scheme in deference to Spanish objection. The complacency of France is easily explained by the political and family connection of its court with that of Spain, and there is no reason to attribute that of England to any but political causes; and Calvo, who maintains the justice of the Spanish title, appears to put it on the ground of priority of discovery and not on that of dependence on the continent, though he relates the claim made on that ground[2]. As a counter-instance of greater moderation the statement of the Under-Secretary for Foreign Affairs may be mentioned, "We are advised that the fishing off the Seven Stones is not within British territorial waters, and the right of foreign boats to fish there cannot therefore be contested[3]." These are rocks at the mouth of the Bristol Channel of which occupation would be

[1] Parliamentary Paper c. 4390; *Handbuch des Völkerrechts*, vol. 2, p. 266, note 12.

[2] Calvo, *Le Droit International théorique et pratique*, vol. 1, § 218.

[3] *Times*, 1 April 1903; Questions not answered orally.

impossible, but, not to mention the question whether they might not be considered as dependencies of the Scilly Isles, from which they are only a few miles distant, the fishing there would be dangerous without the lightship which England maintains in proximity to the Stones.

If an island should lie partly within and partly outside the range of territorial water measured from the mainland or from another island, and the acquisition of an original title to it came into question, it would be difficult to contend that such a title could be gained to any part of it otherwise than by effective occupation.

Lord Stowell once had before him the case of "a number of little mud islands composed of earth and trees drifted down by the river [Mississippi], which form a kind of portico to the mainland." He held "that they are the natural appendages of the coast on which they border, and from which indeed they are formed. Their elements," he said, "are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law, *quod vis fluminis de tuo praedio detraxerit*, and *vicino praedio attulerit*, *palam tuum remanet*, even if it has been carried over to an adjoining territory." He therefore decided that these islands were a part of the territory of the United States, and that, they being neutral, the three miles within which belligerent capture could not lawfully be made were to be reckoned from the islands outwards[1]. It will be observed that Lord Stowell did not mention the distance of the islands from the mainland, whence we may conclude that he did not regard it as important where "the principle of alluvium and increment" applies.

[1] *The Anna*, 5 C. Robinson 373.

CHAPTER VI.

MINOR TERRITORIAL RIGHTS.

In this chapter we propose to discuss certain rights or claims in relation to territory which fall short of sovereignty in its fullest shape, either because care is taken to distinguish them from it in name though in substance there is little distinction, which is the case of colonial protectorates, or because they disclose rather the desire of acquiring sovereignty than its acquisition, which is the case of some of the so-called spheres of influence or interest, or because they are terminable, which is the case of leases properly so called, or for any other reason.

Colonial Protectorates.

It will have been observed that Art. 34 of the Berlin Conference lays down the same condition of notification for taking possession of territory on the coast of Africa and for assuming a protectorate there, but that it is only to occupations that Art. 35 attaches the obligation of insuring the existence of a sufficient authority[1]. The draft prepared by a committee included protectorates in Art. 35 also, but on the discussion of that draft in the commission they were omitted in that place on the motion of the British plenipotentiary, Sir Edward Malet. After that omission had been decided on, the French plenipotentiary, M. de Courcel, obtained the substitution in Art. 35

[1] See above, p. 108. The translation in the Parliamentary Paper c. 4361 says, "the *establishment* of authority," but the French text has *existence*, and the difference should be noted with reference to what follows in the present paragraph. The proceedings of the conference referred to will be found in the Annex no. 1 to Protocol no. 8.

of the words "insure the existence of authority" for the words "establish and maintain a jurisdiction." He said that "the latter form would lead to the supposition that in every new occupation it would be necessary to introduce organic innovations for the distribution of justice, while it might be that in certain regions the existing institutions would be found to be sufficient and would simply be preserved." It follows that taking possession in Art. 34 and occupation in Art. 35 were understood not to apply exclusively to uncivilised countries, but to include the annexation by a signatory power of territory possessing institutions capable of meeting its needs at least for a time after the appearance of white men in it, in a word, of territory belonging to some state. But if state territory was in the mind of the conference as a possible object of taking possession or occupation, terms more familiar in relation to uncivilised countries, much more must this have been the case when protectorates were mentioned, a term not then familiar except in relation to states[1]. It is true that a different use of the term was then beginning. In the general haste to partition the globe effective occupation was beginning to seem too slow a process. If a complete title could only be gained by means of it, at least it might be possible for a power to put in a provisional claim to a region before it suited its policy even to enter on the gradual process of effective occupation. For this purpose the name of protectorate was extended to cases where the only possible subject of protection was a native population living in that primitive social condition which, as we have seen, has never been regarded by white men as presenting an obstacle to their own assumption of political power. These are the colonial protectorates, and the name had the double advantage of giving a flavour of international law to a position intended to exclude other states before such exclusion could be placed on the ground of duly acquired sovereignty, and at the same time of allowing that position to be abandoned with less discredit than attaches to the abandonment of sovereignty, if the country should be found less valuable or its retention more costly than had been hoped. Protectorates of both kinds must be considered as having been

[1] See above, p. 22, as to protectorates over states.

included in Art. 34 of Berlin, though Sir Edward Malet's objection to their being mentioned in Art. 35 probably arose from looking only at the operation of that article, if they were mentioned in it, on the normal case of a protectorate, namely that in which local institutions not incapable of meeting the needs of white men to a certain extent would exist.

The first step which a government takes towards establishing a colonial protectorate usually is that an agent of it, to whom the name of consul is often given, concludes treaties with native chiefs, or that the government adopts the treaties concluded with native chiefs by its subjects as private adventurers. To proceed by agreement is always desirable and generally possible, though too often force is the first means employed against the indigenous population. But such agreements ought to be strictly limited to the things which the natives can understand, among which property and its transfer are commonly to be found, but certainly not the complicated arrangements of a modern state.

Within that limit the rights acquired from the natives may be of legal validity even under the white government to be ultimately established; outside it they have not so much as moral validity, either as a foundation for such a government or for any other purpose. But the limit has often been flagrantly transcended, especially by private adventurers. An example is a treaty concluded in 1890 by the representative of a British company with a drunken savage dignified as "king or chief of Manika," who was made to grant to the company a perpetual monopoly of almost everything that white men can do, including banking and electric lighting[1]. Good examples on the other hand are furnished by the treaties which the British consul signed in 1889 with the Makololo chiefs of Nyasaland, providing for peace, free access to all parts of the country, the right to build houses and possess property according to the laws in force there, liberty to trade and manufacture, and the decision of differences by a duly authorised representative of the British crown; and binding the chiefs not to cede any territory to any other power, or to enter into any treaty with any foreign

[1] Parliamentary Paper c. 6495, p. 28.

government except through and with the consent of the British crown[1]. Such a form of treaty, in which no attempt is made to derive sovereignty by cession from natives who do not possess the ideas and habits implied in a state, is in accordance with principles more than once recognised by the British parliament. The Pacific Islanders Protection Act of 1875 enacted that it should be "lawful for Her Majesty to exercise power and jurisdiction over her subjects within any islands and places in the Pacific Ocean, not being within Her Majesty's dominions nor within the jurisdiction of any civilised power, in the same and as ample a manner as if such power or jurisdiction had been acquired by the cession or conquest of territory[2]." And the Foreign Jurisdiction Act of 1890 enacted that "where a foreign country is not subject to any government from which Her Majesty the Queen might obtain jurisdiction by treaty, capitulation, grant, usage, sufferance or other lawful means, Her Majesty shall by virtue of this Act have jurisdiction over Her Majesty's subjects for the time being resident in or resorting to that country[3]." It is not therefore from the natives that the powers and rights constituting a colonial protectorate are derived, and the absence of local institutions that can be utilised obliges the state assuming such a protectorate to put its own personality forward and itself act wherever required throughout the region comprised in it. Hence, as Mr Hall justly observes, "the powers exercised in a [colonial] protectorate are in fact territorial. Each and every sovereign power is territorial in that it obliges every person within the territory of the state or community to the extent of its applicability; and inversely, every power which extends over the whole territory is a part of or an emanation from the state sovereignty[4]."

But a colonial protectorate, emanation though it be from the sovereignty of the state assuming it, differs from the establishment

[1] Parliamentary Paper c. 5904, p. 156.

[2] St. 38 and 39 Vict., c. 51, s. 6.

[3] St. 53 and 54 Vict., c. 37, combining with s. 2 the words in the preamble to which that section refers.

[4] *A Treatise on the Foreign Powers and Jurisdiction of the British Crown*, § 98, pp. 224, 225. The insertion of the word "colonial" is required by the context.

of that sovereignty in the country over which it is assumed; there is no annexation by the state in question. This distinction, even while it lasts, is attenuated by the circumstance that a colonial protectorate is intended by the state assuming it to exclude the action of other powers as completely as it would be excluded by annexation, since otherwise the protectorate would not have the desired effect of earmarking the country for the future enjoyment of the assuming state. And the distinction is usually transitory as well as attenuated, for the action taken in a colonial protectorate, if persevered in, necessarily has the effect of preparing the way for annexation and leading up to it. Soon the country is no longer described as a protectorate but as a colony, or it is incorporated in an adjoining colony, and even before that stage is reached the difference between the protectorate and a dominion may have become imperceptible, especially where its administration is closely connected with that of an adjoining colony. The British protectorate of Bechuanaland presents a remarkable case. When established in 1885 it was the most advanced post of British rule or influence towards the interior of South Africa, as is usual with colonial protectorates, but it has ceased to be so. Not only has the territory of the South African Republic, which lies to the east of it, been acquired by conquest, but Rhodesia, which lies to the north of it, is as much British soil as is British India, having been acquired by the British South Africa Company, and therefore for the crown, as are all the territorial acquisitions of subjects, and its administration having been in part taken over by the crown. The Bechuanaland Protectorate therefore is nearly surrounded by British territory, and a strip of it, through which the railway runs, has been made indisputably British. It would therefore be pedantic not to consider the whole as British territory in the sense of international law, subject for international purposes to the rights of Khama and the other chiefs which have been acknowledged by agreements with them.

A colonial protectorate then may be defined as a region in which there is no state of international law to be protected, but which the power that has assumed it does not yet claim to be internationally its territory, although that power claims

to exclude all other states from any action within it[1]. The British colonial protectorates in Africa which appear still to bear that character in its purity are those of Northern Nigeria, Uganda and Somaliland, but there are five or six others the administration of which has become closely connected with that of adjoining colonies. In the Indian Archipelago there is a protectorate which the British Government proclaimed in 1888 over the so-called state of North Borneo, to which name there is nothing to answer except the territory held by the British North Borneo Company under grants made by the Sultans of Brunei and Sulu, both Mahometan rulers, and which is now administered by the company subject to its appointment of the governor being approved by the British Secretary of State. The Sulu Archipelago has passed to the United States, and Brunei was taken in 1888 under British protection of the ordinary international kind. So the British North Borneo Protectorate is anomalous. Being composed of fragments detached from Mahometan states it cannot be regarded as a colonial protectorate in an uncivilised region, but the nominal state over which protection is asserted seems to have been invented for the purpose of preventing the annexation of the country, which would have followed if it had been treated as an acquisition made by the company.

Although it is only in the territories occupied by them on the African coast that Art. 35 of Berlin expresses the obligation of the powers to assure the existence of an authority sufficient to cause acquired rights to be respected, there can be no doubt that the principle of that obligation applies equally to colonial protectorates. A power which pretends to exclude the action of other powers from a region lying open to white enterprise must itself supply the civilised action necessary for the safeguard and

[1] The Institute of International Law, at its meeting at Lausanne in 1888, adopted a set of articles in the first of which the conditions for the effective occupation of a territory *à titre de souveraineté* were laid down, and of which the second was this: *Les règles énoncées dans l'article ci-dessus sont applicables au cas où une puissance, sans assumer l'entière souveraineté d'un territoire, et tout en maintenant avec ou sans restrictions l'autonomie administrative indigène, placerait ce territoire sous son* PROTECTORAT. Annuaire, 10me volume, p. 202; *Tableau général de l'Institut de Droit International*, p. 146.

regulation of such enterprise, in the degree in which on a fair construction it is from time to time necessary, equally whether the pretension to exclude is based on annexation or on the assumption of a protectorate[1]. And no action can be adequate to meet such needs which does not include the exercise of jurisdiction within the region over the subjects of foreign powers as well as over those of the power assuming the protectorate. This is so clear that a state which acquiesces in its own exclusion from a given territory must be understood to acquiesce in the exercise there of jurisdiction over its subjects by the state to which it leaves the territory free. Accordingly "the law regulating jurisdiction in the German protectorates, as modified by alterations introduced by imperial decree of 15 March 1888, expressly declares that it is competent to the imperial authority to extend jurisdiction over all persons irrespectively of their nationality, and to place natives of the territory on the same footing as German subjects with regard to the right of flying the imperial flag[2]." And by the first article of the General Act of the Brussels Conference of July 1890 it is declared that "the most effective means for counteracting the slave trade in the interior of Africa are the following: (1) progressive organisation of the administrative, judicial, religious, and military services in the African territories placed under the sovereignty or protectorate of civilised nations"; while in the second to the seventh paragraphs are prescribed the establishment of occupied stations, roads, railways, inland steam navigation, telegraph lines, and the maintenance of restrictions on the importation of fire-arms and ammunition. Hall, quoting this, justly observes that "evidently on the one hand acts of the nature contemplated and prescribed compel extensive interference with the internal sovereignty of a community, and involve a commensurate as-

[1] See the resolution of the Institute of International Law which, by the effect of Arts. 1 and 2, quoted respectively on pp. 113 and 126, requires even in protectorates the establishment of a responsible local power.

[2] Hall on the *Foreign Powers and Jurisdiction of the British Crown*, p. 208. The reference is to the *Gesetz betreffend die Rechtsverhältnisse der deutschen Schutzgebiete vom* 15 *März* 1888, Art. 2, § 7, in the *Reichsgesetzblatt* of that date.

sumption of sovereignty by the protecting state; on the other the objects aimed at can hardly, if at all, be attained compatibly with the exemption of European traders and adventurers from the local civilised jurisdiction[1]."

But the Orders in Council which regulate the exercise of jurisdiction in British colonial protectorates were at first so drawn as to confer it, or to recognise its existence, only over British subjects and not over those of other states. There are several ways in which a state may acquire jurisdiction outside its dominions. One is where an oriental power, without becoming subject to a protectorate, grants to foreign consuls jurisdiction over their respective nationals within its territory. Then the consular jurisdiction so founded may be carried a step further by usage; for the usage of European states by which differences between their subjects in the East are submitted to the jurisdiction of the defendant's consul amounts to consent, which is another lawful source of jurisdiction[2]. But further, if a state becomes subject to a protectorate, its sovereignty is divided between itself and the protecting state according to the terms of the arrangement between them; and there seems to be no reason why those terms should not assign to the latter the jurisdiction over all foreigners within the territory of the former. Third states might object to the establishment of a particular protectorate so defined, just as they may object to any international arrangement which they conceive to be detrimental to their just interests, but no general principle of international law would be violated by it. Thus France, by the treaties between her and her protected states of Annam and Cambodia, has acquired jurisdiction over foreigners in them, and the French Court of Cassation has by fair reasoning deduced a similar power from the terms, by no means express, of the treaty with the protected sultan of Johanna or Anjouan[3]. By the declaration of 16 December 1892 between Great Britain and Zanzibar, when the defendant or accused is a subject of the latter or of some other non-Christian power not represented by consuls and

[1] Hall, u. s., p. 207. See also pp. 213, 214.

[2] See Dr Lushington in *Papayanni* v. *Russian Steam Navigation and Trading Company*, 2 Moore P. C. 183.

[3] Hall, u. s., p. 209.

a British subject is concerned, the judicial power of the sultan is delegated to the British sovereign. All these cases have the common feature that the jurisdiction concerned in them is obtained from a foreign government, and fall within sect. 1 of the Foreign Jurisdiction Act 1890. Colonial protectorates fall under sect. 2 of that Act, quoted above[1], as being exercised in countries not subject to any government from which the British sovereign might obtain jurisdiction, and that section gives him jurisdiction only over his own subjects. It might well however have been considered that the assumption in such protectorates of jurisdiction over the subjects of foreign states would be warranted as well by the nature of the case as by foreign example, and this view appears to have since been taken, for in 1893 the Pacific Order in Council provided that consent to the jurisdiction should be required from foreigners or natives only "in islands and places which are not British settlements or under the protection of Her Majesty[2]." In further support of the same view Hall, soundly as we think, brings forward the analogy which the assumption of a colonial protectorate bears to conquest, its territorial character making it practically equivalent to the assumption of some part at least of sovereignty, notwithstanding the care taken to distinguish it from complete annexation. And, as he argues, since in cases of conquest the crown acquires full jurisdiction over every person on the soil without the necessity of waiting for the sanction of parliament, the jurisdiction over foreigners in colonial protectorates, if placed on this ground, needs no support from the Foreign Jurisdiction Act 1890[3]. It would indeed be difficult to reconcile its repudiation with the assertion of jurisdiction over the native inhabitants of such protectorates, which is believed to be the constant practice of British authorities.

[1] P. 124.

[2] Hall, u. s., pp. 215, 231.

[3] *Ib.*, pp. 224, 225.

Spheres of Influence or Interest.

(A.) Agreements for Reciprocal Abstention from Territorial Expansion.

Colonial protectorates differ so little from annexations, especially in the responsibilities which they involve, that they could not satisfy the haste which characterised the latter part of the nineteenth century for the provisional appropriation of territories in advance of anything resembling occupation. A more shadowy form of earmarking was therefore invented, in what are called spheres of influence or interest. It cannot be expected that these shall be definable either in the form of their acquisition or in their effect when acquired: such precision would defeat the object. We can only notice the different modes of international action which have given occasion for their being claimed.

The most frequent of those modes of international action has been the conclusion between two powers of an agreement by which each promises not to pursue a policy of territorial expansion beyond a certain line. As an example we may take the declaration of 6 April 1886 between England and Germany, by which a certain line was drawn in the Western Pacific, and a reciprocal engagement was made in these terms:

"Germany [Great Britain] engages not to make acquisitions of territory, accept protectorates, or interfere with the extension of British [German] influence, and to give up any acquisitions of territory or protectorates already established, in that part of the Western Pacific lying to the east, south-east, or south [west, north-west, or north] of the said conventional line."

This was accompanied by some collateral stipulations, as may always be the case with such arrangements. Nothing can be more simple than an agreement of the kind, if taken as it stands. Each contracting party promises to abstain from every form of aggrandisement on the other side of the boundary laid down. On its own side each must pursue its aggrandisement, if at all, by the methods and subject to the conditions applicable in other cases to the acquisition of possessions or protectorates. Until that is done, and except so far as it is done, nothing is acquired by either. If either meets on its own side of the boundary with a third power, the rights of the

latter are intact. The agreement is *res inter alios acta*, and cannot be quoted against it.

It is probable that the earliest of these agreements for reciprocal abstention were concluded without a thought of their leading indirectly to anything more than is contained in their tenour. As precluding jealousies and conflicts between the powers signing them in the parts of the world to which they related, they were valuable enough, simply as they stood, to make it unnecessary to search for any other motive for them. But every legal practitioner or observer of human nature knows how inveterate is the habit of appealing to an "understanding" when agreements fail; and so it was inevitable that when an agreement between two powers for reciprocal abstention has been published, and a considerable time has elapsed without third powers protesting or signifying their reserves, a popular notion should arise that the obligation of abstention is extended to third powers by an "understanding," and that a sphere of influence is thus created generally and not merely as between the parties. In strict law there are two answers to that notion. One is that silence only damages where there is occasion for speech, and that an agreement by state *A* to abstain from territory *X*, since it does not interfere with any rights or expectations of state *B* relating to that territory, does not call on state *B* for speech. The other is that the thing which it is attempted to build on the foundation of silence, namely a commencement of appropriation without a commencement of effective occupation, does not exist in international law. The utmost that can be said in favour of the notion is that state *A*'s agreement with state *C* to abstain from territory *X* encourages a hope in state *C*, and that it would be unfriendly in state *B* to thwart that hope after it has long been entertained without warning. This is true, and it would be foolish to ignore the great part which unfriendliness and the suspicion of it, even unaccompanied by any violation of legal right, play and are always likely to play in determining the international conduct which is the practical interpretation of international relations. On the other hand a line of argument which would oblige a state to signify at once its reserves about an agreement not in

itself concerning it, reserves which if they were not forced into publicity the occasion might never arise for disclosing, would seem rather to tend towards multiplying the exhibitions of jealousy and unfriendliness between states than towards avoiding them. Hall, in discussing the question, points out that the ambiguous character of spheres of influence will make it advisable to shorten their duration. "It is not likely," he says, "that an influencing government will find itself able for any length of time to avoid the adoption of means for securing the safety of foreigners, and consequently of subjecting the native chiefs to steady interference and pressure. Duty towards friendly countries and self-protection against rival powers will alike compel a rapid hardening of control, and probably before long spheres of influence are destined to be merged into some unorganised form of protectorate analogous to that which exists in the Malay Peninsula[1]."

The most important diplomatic incident connected with this question is that caused by the French occupation of Fashoda on the Nile in 1898. By the Anglo-German agreement of 1 July 1890 Germany had recognised a British sphere of influence extending to "the western watershed of the basin of the Upper Nile[2];" and by the Anglo-Congolese agreement of 12 May 1894 the sovereign of the Congo State "recognised the British sphere of influence as laid down in the Anglo-German agreement of 1 July 1890," and Great Britain undertook to give that sovereign a lease of certain territories carved out of that sphere, which during his reign would include Fashoda but would afterwards be diminished in extent[3]. By an exchange of letters of even date with the agreement, this lease was to be subject to "the claims of Turkey and Egypt in the basin of the Upper Nile[4]." We may here pause to note the high value which granting a lease out of it shows to have been placed on the interest created by Germany's agreement of abstention. But to proceed with our narrative, by the Franco-Congolese agreement of 14 August 1894 the Congo sovereign, in deference to

[1] *Foreign Powers and Jurisdiction of the British Crown*, p. 230.
[2] Hertslet, map of Africa by Treaty, p. 642.
[3] *Ib.*, p. 1003.
[4] *Ib.*, p. 1012.

the protest of France, undertook not to use the rights given him by the lease in a region including Fashoda[1]. Finally, on the overthrow of the Khalifa in 1898 by Lord Kitchener in command of Egyptian and British forces England seized the opportunity of asserting the dormant claim of Egypt to Fashoda. It is as an Egyptian possession, in which England shares in consideration of the part she took in its reconquest, that the place has been governed since the retirement of the French from it[2], and the arguments founded on the British sphere of influence which were used in the discussion with France may perhaps have been so used only as makeweights, though something may have been due to the situation as it concerned Egypt not having then been regulated In any case they must be noted as expressions of opinion on the subject now occupying us. Lord Salisbury said to the French ambassador that "France had received repeated warnings that a seizure of land in that locality could not be accepted by Great Britain. The first warning was the Anglo-German agreement, which was communicated to the French government, and the provisions of which as regards the Nile were never formally contested. The next warning was given by the agreement with the king of the Belgians, the sovereign of the Congo State, the concession made by whom in the Franco-Congolese agreement "did not diminish the significance of the act as an assertion of her rights by England." His lordship next referred to a speech made in 1895 by Sir Edward Grey, then under-secretary of state for Foreign Affairs, respecting the intentions of England, to which the French foreign minister was officially informed in 1897 that Her Majesty's then government adhered. And he said: "if France had throughout intended to challenge our claims, and to occupy a portion of this territory for herself, she was bound to have broken silence[3]."

The ultimate result of the same incident was a delimitation of the British or Anglo-Egyptian and French spheres of influence

[1] Hertslet, op. cit., p. 1021.

[2] See the Anglo-Egyptian convention of 19 January 1899, in the Egyptian *Official Journal* of that date and the *Times* of 20 January 1899. The Fashoda incident has been noticed for another purpose, above, p. 66.

[3] Lord Salisbury's despatch of 6 October 1898, in Parliamentary Paper, Egypt, no. 3, 1898: *Times* of 25 October 1898.

in North Central Africa, by which the line between them was drawn on the west of Darfur, leaving on the French side of it Wadai, which lies south of Tripoli, a Turkish province which Italy had long regarded as her future share in possible dismemberments of the Turkish empire. This gave great offence to Italian opinion, as though it were a condemnation of the claim of Italy to extend her influence or interest to the natural back country (*hinterland*) of Tripoli, in the case of her acquiring that province. And thus another instance was furnished of the impossibility of limiting the international effect of reciprocal agreements for abstention to their strict terms as between the parties to them, at least so far as that effect may consist in creating opinion and situations dependent on opinion.

(*B.*) *Agreements not to alienate territory.*

Another mode in which it has been recently attempted to create spheres, perhaps this time to be more correctly described as of interest rather than of influence, is by agreements in which an oriental state binds itself not to alienate certain territory. Such are the agreements which China made in 1898 with Great Britain, that she "will never alienate any territory in the provinces adjoining the Yang-tsze to any other power, whether under lease, mortgage, or any other designation"; with France, not to alienate any portion of the provinces of Kwangtung, Kwangsi and Yunnan; and with Japan, not to alienate the province of Fokien. China also in 1897 promised France not to alienate the island of Hainan. By these means the respective stipulating power makes known to the world that it claims, next to the state actually in possession, an interest in the given territory. If the state actually in possession should so completely break up that no fragment of it can be treated as succeeding to its international obligations, the agreement would fall to the ground for want of a party bound by it, but the stipulating power might use against third states the publicity of the agreement, and the fact that it had long remained without protest by them, as the foundation for a right of succession in the given territory. The claim would be similar to that by which it is attempted to establish the generally binding char-

acter of spheres of influence created by reciprocal agreements of two powers for abstention from territorial expansion, and the same topics of argument apply for and against both. In the mean time the agreement sanctions no interference in the territory with the state actually in possession. What it creates is a questionable reversionary right, which, so far as it exists, must be called territorial since it is to territory that it applies, and must therefore be classed among the minor territorial rights.

Leases.

In recent times there have been many cases in which an interest in territory has been granted by one state to another under the name, drawn from the analogy of property, of a lease, in French *bail*. Such are the leases granted by China in 1898 of Port Arthur and Talienwan to Russia for 25 years, now vested in Japan; to England of Weihaiwei "for so long a period as Port Arthur shall remain in the occupation of Russia," and of Kaulung for 99 years; to Germany of Kiauchau for 99 years; and to France of Kwangchauwan. Such also are the leases of different parts of his mainland dominions which the sultan of Zanzibar granted to the British East Africa Company in 1888 and 1890 for 50 years, extended in 1891 to perpetuity, and now held by the British crown. Such too are the leases which Great Britain and the Congo State granted to one another of certain African districts in 1894, to endure "so long as the Congo territories as an independent state or as a Belgian colony remain under the sovereignty of His [Belgian] Majesty or His Majesty's successors," except as to a part of that granted to the Congo State, which was to determine when the actual king of the Belgians should cease to be its sovereign[1].

When property is leased, the lessor retains a proprietary right which runs concurrently with the lessee's right of enjoyment[2]. If therefore the analogy were closely pressed, the state

[1] See above, p. 132.

[2] This statement is substantially true in all cases, though in English law the lessor's right is the actual freehold when the lease is for years and only reversionary when it is for a life, while in Roman law it is always the *nuda proprietas*. Even when the lease is in perpetuity, that is an *emphyteusis*, the emperor Zeno decided that the lessor remains the *dominus*.

which grants a lease of territory would be held to retain all the time some sort of sovereignty over it. This however would not suit the parties to such transactions as those which have been mentioned, since the lessee state requires the unrestricted use of the soil for the erection of fortresses and other purposes as well warlike as pacific, while the lessor state would object to the loss of its neutrality which would result from the use by the other of what was in any sense its territory in or in support of warlike operations against a third. We must then agree with Despagnet who, after remarking that the restoration of the territory at the end of the specified term is very unlikely, says that these pretended leases are alienations disguised in order to spare the susceptibility of the state at whose cost they are made. He adds the motive of avoiding disquiet to rival powers, but it cannot be imagined that any power would be deceived by the fallacious appearance[1]. The complete transfer of sovereignty for the specified term is also the official German interpretation of an international lease, the *Imperial Gazette* of Berlin having announced with regard to Kiauchau that "the Imperial Chinese government has transferred to the German government, for the period of the lease, all its sovereign rights in the territories in question[2]." On the other hand the official statement in the Russian press bore that Port Arthur and Talienwan, with the adjacent territories, had been "ceded in usufruct to the imperial government for a term of 25 years," and that this was an arrangement "safeguarding the integrity of the sovereign rights of China, and satisfying the essential needs of Russia alike as a maritime power and a territorial neighbour[3]." This may pass as rhetoric, but it cannot be doubted that the practical Russian view was the same as the German, and that the Japanese view is such also.

[1] § 394 *bis.* In an unsigned article in the *Revue Générale de Droit International Public,* edited by Mm. Pillet and Fauchille, it was said of the lease by England to the Congo State that the expression used ought not to cause any illusion about the real nature of the contract, and that a lease without any rent due from the lessee and without limit of continuance is not a true letting but an alienation: 1 *R. G. de D. I. P.* 380.

[2] *Times* of 6 January 1898.

[3] *Times* of 30 March 1898.

Rights to Occupy and Administer.

The Treaty of Berlin, 1878, Art. 25, provided that "the [Turkish] provinces of Bosnia and Herzegovina shall be occupied and administered by Austria-Hungary," and went on to attenuate that provision so far as concerned the sandjak of Novi-Bazar, a part of the vilayet or province of Bosnia, on the details relating to which the Austro-Hungarian and Turkish governments reserved to themselves to come to an understanding. By their convention of 21 April 1879[1] the two governments not only settled the details relating to Novi-Bazar, but made several stipulations concerning the territory to be occupied, one of which (Art. 6) was that "the question of the treatment of the inhabitants of Bosnia and Herzegovina living or travelling outside those provinces shall be regulated later by a special arrangement." It was also recited in the preamble that "the fact of the occupation of Bosnia and Herzegovina does not impair (*ne porte pas atteinte aux*) the rights of sovereignty of H.I.M. the Sultan over those provinces." Thus the Austro-Hungarian right in the occupied provinces, the extent of which might have been doubtful if it had rested on the treaty of Berlin alone, was made to appear as a right of internal administration, free except in the particulars provided for by the convention but devoid of the character of sovereignty, and unaccompanied by external powers. Nevertheless the Austro-Hungarian law of 3 November 1881 subjected the people of the occupied provinces to military service, which the eminent Russian jurist F. de Martens characterised as "undoubtedly an act which violates their conscience and their direct obligations to their legitimate sovereign the Sultan[2]." And the treaty of commerce of 1881 between Austria-Hungary and Servia, after stipulating various rights for the subjects of each party in the territory of the other, declared the treaty to be applicable to all countries comprised in the Austro-Hungarian customs territory, in which the occupied provinces had been included. Thereupon, a

[1] Holland, *European Concert on the Eastern Question,* p. 356.

[2] *Traité de Droit International,* French translation, vol. 1, p. 478.

Herzegovinian named Bochko having died in Servia in 1891, leaving property there which was claimed by his Herzegovinian heirs, the Servian court of first instance refused to apply the treaty on the ground that only Turkey had the right to conclude conventions regulating the legal position of Bosnians and Herzegovinians in foreign countries, an opinion shared by F. de Martens[1]. But the Court of Cassation at Belgrade reversed the decision on the ground that the objection to the treaty, although sound, ought to have been taken by the Servian legislature when voting on its ratification, and that as it had not done so the judicial power was bound. The Austro-Hungarian government maintained its view, and a new treaty of commerce with Servia in 1892 reproduced the article objected to[2].

In these circumstances the actual extent of the right of Austria-Hungary in the occupied provinces was the subject of controversy. Holtzendorff said that Austria, in introducing military service and establishing new courts of justice, overstepped the boundaries of occupation and administration, and did that for which international law can find no basis in her contract. But he added that those dispositions had met with recognition by other powers, which, for example, had accepted the withdrawal from them of the consular jurisdiction which they enjoyed under the Turkish capitulations[3]. Bluntschli boldly carries the substantial right of Austria-Hungary up to the treaty of Berlin itself, saying in his criticism of that document: "She does not govern the country as the Sultan's mandatory and in his name but in her own name, she administers the country not on behalf of the Sublime Porte but in the interest of the populations. She is in *possession* of the sovereignty, which in theory continues to belong to the Sultan. The Sultan's right is a *nudum jus* without efficacy, a mere semblance of right[4]." On the other hand the Servian patriots, who saw in Austria-Hungary the obstacle to the inclusion of

[1] u. s., p. 479.

[2] See articles by Professor Péritch in the *Revue de Droit International et de Législation Comparée*, 2me série, t. 3, nos. 50, 241, 398.

[3] Vol. 2, p. 116, note 5.

[4] 13 *R. de D. I. et de L. C.*, p. 585.

Bosnia and Herzegovina in a Greater Servia[1], and F. de Martens[2], represented the mission confided to Austria-Hungary for the pacification of those provinces as conditional, subject in case of failure to be recalled by the powers, which might then make or approve some other arrangement. To us it seems that the mission cannot have been assumed with such an understanding. It is always impossible to predict what may be the consequences of prolonged disorder in any part of the world, but a great power only accepts a position treated as assured, and not one in which the continuance of disorder under its rule is contemplated as a contingency.

It remains to observe that the right of Austria-Hungary in Bosnia and Herzegovina, whether it was one of practical though not nominal sovereignty or only one of internal administration, belonged to the dual monarchy. There was no reason why that monarchy, forming as it does one state of international law, should not have a dependency annexed to it, to be governed by its common ministries as Bosnia and Herzegovina were in fact governed. Therefore the argument that annexation was impossible without saying whether it was to Austria or to Hungary was unsound, and it is to the dual monarchy that the two provinces were annexed in 1908.

By the Anglo-Turkish convention of 4 June 1878 and another, called an annex to it, of 1 July of the same year, the sultan assigned Cyprus "to be occupied and administered by England," and certain stipulations were made about its administration. The arrangement is the same as that for the provinces occupied by Austria-Hungary, both in the terms "occupy and administer" used to describe it and in the unconditional character and unlimited duration given to it[3], but in other respects

[1] 3 *R. de D. I. et de L. C.*, 2me série, p. 53.

[2] *Traité de Droit International*, vol. 1, p. 478.

[3] It is with great respect for his learning that we have to note an error into which F. de Martens has fallen in saying that Cyprus "is only occupied by the English conditionally, until the introduction of the promised reforms; as soon as they have been accomplished the island must be restored to Turkish administration": *Traité de Droit International* 1, 476. The convention of 4 June engages England in certain contingencies to join the sultan in defending certain territories by arms; the sultan promises in return to introduce reforms in those territories, "and in order to enable England to make necessary provision for executing her engage-

there are differences. The assignment of Cyprus is not based on any irremediable inability of the Sultan to secure the peace of the island, which had not in fact been disturbed; the continuance of a Mahometan religious tribunal, to which there was nothing parallel in the Austro-Turkish convention, is stipulated; and England is to pay to the Porte an estimated annual excess of revenue over expenditure, while in the other case it was merely provided that the revenues of Bosnia and Herzegovina should be exclusively applied for those provinces. The administration of Cyprus is now conducted by a high commissioner, who acts "in the name and on behalf of His Majesty" the British sovereign, and makes laws and ordinances with the advice of a legislative council, subject to a power of disallowance retained by the crown, which can also legislate directly for the island by order in council. The extradition of criminals and accused persons is provided for, and, as in the Austrian case, the other powers have acquiesced in the supersession of the consular jurisdiction by the British courts. But "natives of the island of Cyprus are not considered to be protected subjects of the [British crown] in countries foreign to the Ottoman empire, or even in Egypt, still less therefore in other parts of the Ottoman dominions[1]."

There has therefore been a real dismemberment of the sovereignty of Cyprus. Along with the whole of its name the Sultan retains some part of its rights. He is not quite reduced to the *nudum jus* which Bluntschli found for him in Bosnia and Herzegovina, but his share is insignificant.

ment, H.I.M. the Sultan further consents to assign the island of Cyprus to be occupied and administered by England." The contingencies for the operations of the defensive alliance were afterwards affected by the signature of the treaty of Berlin, but there remains this one, "if any attempt shall be made at any future time by Russia to take possession of any further territories of H.I.M. the Sultan in Asia as fixed by the definitive treaty of peace." So, the engagement of England extending to all future time, the assignment of Cyprus as the necessary provision for enabling her to execute it, which is in no way made dependent on the introduction of the reforms, cannot be limited. The convention and annex are in Holland's *European Concert in the Eastern Question*, pp. 354–5.

[1] Hall, *Foreign Jurisdiction of the British Crown*, p. 226, note.

We may mention here, though only to exclude them from the list of minor territorial rights, spheres of influence of a wholly political character, the influence being exercised only over rulers and being at least actually unaccompanied by territorial pretensions, whatever pretensions of that kind may be destined to arise. Such are those of England in relation to Afghanistan, to certain Shan states in the Indo-Chinese peninsula, and to the Arab chiefs at the back of Aden. It must further be observed that all the instances thus quoted stand in relation to the Indian empire of England, and cannot therefore be subjected to the classifications of European and American international law[1]. Agreements for exclusive or preferential privileges of an industrial or commercial nature have been obtained from China by some powers, as by Germany for Shantung, by France for mining rights in the area to be traversed by the intended railway from Yunnanfu to Laokai, and by Russia, now having Japan as her successor, in Manchuria. But these also, whatever may be their effect as stepping-stones, cannot in themselves be classed as even minor territorial rights.

Asserted Spheres of Influence by Rudimentary Relations with Natives.

The eminent Portuguese jurist and statesman Martens-Ferrão defended the claims of his country during the difference with England as to their African possessions and interests which was ended by the convention of 11 June 1891, on a ground which may be noticed here in connection with spheres of influence, although it might also have found a place in relation to modes of acquiring sovereignty in new countries.

M. Martens-Ferrão teaches the sound doctrine that international title to territory cannot be based on "cessions made by native chiefs, half or wholly savage, to the chance comer who gives them the most," because they do not themselves "possess any constituted sovereignty, that being a political right derived from civilisation." Consequently after mentioning, first, *dominium* joined with *imperium*, and secondly, holding states in vassalage, as two of the forms of Portugal's colonial right,

[1] See above, p. 42.

he places the third form which he claims for her on the following ground. "She has also countries with which she has established *rudimentary relations*, founded on the right of first discovery, never abandoned and preserved in this manner. With all these tribes Portugal has always maintained relations by the *rudimentary commerce* of which alone these peoples are capable.... The last form is recognised by public law, and will long continue to be so, in the great and uncertain enterprise of calling to civilisation tribes which at present are still either in the lowest state of decadence of the species or in the most rudimentary infancy." It will be observed that the learned writer, by contrasting the claim which he puts forward with *imperium*, avoids confounding it with the ancient claim by discovery without effective occupation. He is rather to be understood as asserting an exclusive sphere of influence founded on contact and commerce, at least when those advantages are enjoyed by the nation which made the discovery, and conferring a territorial right less than sovereignty, more or less like that resulting from a colonial protectorate or that sometimes considered to result from an agreement for reciprocal abstention from colonial expansion. But this shows on the one hand how jealously the modern notions of rights short of legal sovereignty must be restricted to an inchoate character, if they are not to constitute a relapse into views long ago exploded, and on the other hand how necessary the admission of inchoate rights is to meet political exigencies[1].

[1] See *L'Afrique: la question soulevée dernièrement entre l'Angleterre et le Portugal considérée au point de vue du droit international, par J. B. de Martens-Ferrão.* This essay appeared in 1890 in the *Archives Diplomatiques* as well as separately at Rome and at Lisbon. The passages here referred to are at pp. 9, 10 of the pamphlet with the imprint of Rome.

Notes to Chapters V and VI.

Page 87. The right of escheat seems to be rather regalian than feudal in its origin, but the contrast between it and eminent domain is the same, whether it exists in favour of a feudal lord, of a king, or of the public.

Page 107. In regions in which permanent civilised settlements are impossible, as in Arctic ones, such occupation as is possible must be accepted as effective occupation. See Waultrin, in 15 *Revue Générale de Droit International Public*, pp. 417–423.

Page 135. (1) Great Britain obtained a right of preemption over Muscat by an agreement of 20 March 1891. This, in accordance with what is said in the text as to the limited effect of agreements not to alienate territory, did not violate the reciprocal agreement into which Great Britain and France entered, 10 March 1862, to respect the independence of the sultans of Muscat and Zanzibar.

(2) Still another form of a sphere founded on an agreement is given by the Anglo-French convention of 20 October 1906 relating to the New Hebrides, by which "a region of joint influence" was created in those islands. But this sphere is clearly binding on third powers because the agreement on which it is founded has been followed up by action, amounting to the establishment in the islands of some sort of government, very imperfect though it be, under British and French high commissioners. It is really a sphere of interest.

Page 142. Arguments drawn from Dutch or British influence, of which it was questionable whether it amounted to control, acquired over the Indians, were employed in the Anglo-Venezuelan arbitration of 1899 and the Anglo-Brazilian arbitration of 1904. There is an able criticism of them by MM. de Lapradelle and Politis, *L'Arbitrage Anglo-Brésilien de* 1904, pp. 83–86.

CHAPTER VII.

RIVERS.

Rivers as Boundaries of States.

When a river forms the boundary between two states it is usual to say that the true line of demarcation is the *thalweg*[1], a German word meaning literally the "downway," that is the course taken by boats going down stream, which again is that of the strongest current, the slack current being left for the convenience of ascending boats. It is said that the *thalweg* was first proposed for this purpose at the congress of Rastatt; the older authorities had generally taken the middle line of the river as the true boundary in obedience to the rule of Roman law for the delimitation of properties, which had the inconvenience that as a river falls according to the season a larger space may become uncovered on one side than on the other, and so the middle line of the water may shift[2]. If the river divides into channels or branches, the rule of the *thalweg* points out the branch which is to furnish the boundary, and the islands on either side of that branch belong to the one or the other state

[1] *Thal* in the sense of valley enters into *thalweg* only indirectly. The immediate origin of the word lies in the use of *berg* and *thal* to express the upward and downward directions on a stream, like *amont* and *aval* in French.

[2] Carathéodory, in Holtzendorff, vol. 2, p. 304, note 6. The congress of Rastatt did not end in any treaty, but we presume that the reference is to the French note of 19 July 1798, in which the French negotiators gave up the demand for the whole of the islands in the Rhine and proposed the *thalweg* for the partition of the river. Schoell, *Histoire abrégée des Traités de Paix*, 1re partie, c. 27.

accordingly[1]. In the selected branch, or in the entire river if undivided, signal-posts or other marks are often set up in order to indicate the *thalweg* by marking the line of greatest depth, which is assumed to coincide with it[2]. If this is not done, it will probably be necessary in many cases to fall back on the old rule of the middle line of the water, whether the entire river or a branch. But the whole of this paragraph must be understood as subject to the possibility that a particular river boundary between two states may have been specially arranged by treaty or by undisputed possession. In such cases not only may the islands in the river be divided differently from the result which the general rules would give, but even the whole river may lie in one of the states, the frontier of the other following the shore. Thus by immemorial possession Hamburg has the Elbe and Bremen the Weser for their whole width from the respective city to the mouth of the river, and by the peace of Westphalia Sweden had the whole width of the Oder[3].

The changes in territorial limits which may result from changes in the bed of a boundary river, and the sovereignty over islands newly arising in such a river, are subjects on which the international jurists of the continent naturally have much to say. They are not of great interest to the people of the British isles, and we content ourselves with referring in a note to some of the best and fullest authorities[4].

International Rivers.

An international river is a navigable river which flows through the territories of two or more states, as the Rhine flows from Switzerland into Germany and thence into the Netherlands, or which forms the boundary between states, as the Danube between Rumania on the one side and Servia

[1] It will appear from the last note that it was with a view to the partition of islands that the rule was introduced.

[2] Carathéodory, in Holtzendorff, u. s., p. 303.

[3] Geffcken's note 3 to Heffter, p. 173.

[4] See Holtzendorff, vol. 2, § 56, pp. 266–8; 1 Rivier, 179; Calvo, § 294. The increase of territory through a change in the bed of a stream is called *accession* in French, and that term is adopted in German; the English term is accretion.

and Bulgaria, or Turkey the suzerain of Bulgaria, on the other side. In the middle ages and long afterwards the trade and navigation on such rivers was cruelly hindered by the arbitrary dues exacted by the riparian powers and the arbitrary regulations imposed by them. The vehement outcry against such a condition of things was placed by Grotius on the ground of an appeal to reason. After describing according to the views then prevalent about prehistoric times how an original system of community had been replaced by one of private property, and showing how the rights which so arose are controlled by necessity, he mentions as a source of further restriction on property the advantage which may accrue to one party without harm to the other party, and gives the following example.

"So whatever land, rivers or parts of the sea have become the property of any people ought to lie open to passage by those who have need of it for just causes, as if being expelled from their own country they are seeking vacant land, or desire to trade with a nation not contiguous to them, or even if they are claiming redress by just war. The reason here is the same as above [in the case of necessity], namely that it was possible for property to be introduced concurrently with the admission of such modes of using things as are profitable to the one and do not hurt the others, and therefore the founders of property must rather be considered to have intended this..... But it is asked whether he who has the sovereignty in the soil can impose dues on merchandise thus passing, whether by land, river or such part of the sea as can be called an appendage of the land. Certainly no equity allows any burdens to be imposed on that merchandise which have no reference to it. So also a capitation tax imposed on citizens for meeting the burdens of the commonwealth cannot be exacted from foreigners passing through the country. But if expenses are incurred for the security of the merchandise, or even for that among other objects, they may be compensated by dues imposed on the merchandise so long as the measure of them does not exceed their cause[1]."

[1] *De Jure Belli ac Pacis*, l. 2, c. 2, §§ 13, 14. The doctrine of Vattel is similar. Speaking of lords who establish a toll on a river without spending a penny on the maintenance of the navigation, he says: *le partage et la propriété des terres n'a pu ôter à personne le droit de passage, lorsqu'on ne nuit en aucune façon à celui sur le territoire de qui on passe. Tout homme tient ce droit de la nature, et on ne peut avec justice le lui faire acheter.* Liv. 1, § 104. Again: *le droit de passage est encore un reste de la communion primitive, dans laquelle la terre entière était commune aux hommes et l'accès libre partout à chacun suivant ses besoins. Personne ne peut être entièrement privé de ce droit, mais l'exercice en est restreint par*

That the principle on which the freedom of trade and navigation is thus claimed on international rivers does not include the rivers which are entirely comprised within the territory of a single state, as asserted by Bluntschli[1], appears from the condition that those who use the right of passage must have need of it for just causes. It is common for states to reserve their coasting trade for their own nationals and to prohibit the importation of foreign merchandise in ships of third countries, and no question is ever raised as to the international lawfulness of such restrictions. But a state can no more be bound to open its river ports than its seaports to foreigners. It is only when a state on an international river and an oversea state, or two states on the same international river not contiguous to one another, are desirous of such intercourse, that the vessels of either have a just cause for needing passage through the coriparian territories lower on the river in the one case or separating them in the other case, and that the doctrine of Grotius applies. The test for its application is that the navigation in question has a lawful territorial origin, and a lawful ulterior destination beyond the part of the river through which the passage is claimed. The principle asserts the free use of rivers as the vehicle of intercourse not in itself affecting the country of passage, and nothing more.

Hence it follows that his own principle, applied as we must

l'introduction du domaine et de la propriété. Liv. 2, § 123. The system which Vattel builds on this foundation is that in order to claim the right of passage you must have a necessity for it, in which there can be little doubt that he would have included the desire to trade with a distant nation which Grotius expressly mentions, for, after exemplifying necessity by the inability otherwise to procure the means of living, he adds *ou de satisfaire à quelque autre obligation raisonnable,* and he had maintained (l. 1, § 21) that *une nation doit se perfectionner, elle et son état.* But the territorial sovereign is the judge whether an equal necessity does not prevent him from granting your claim. Only (l. 2, § 129), if the use of his territory which you claim to make would evidently cause him no damage, his refusal will be an injury; and if he gives no reason, which we shall not be wrong in interpreting as no reason which you regard as reasonably sufficient, you may consider him as an enemy and act towards him as prudence dictates. Thus the territorial sovereign is not really allowed much discretion.

[1] *Droit International Codifié,* § 314.

now apply it, cuts out a part of the doctrine which, not inaccurately as international law then stood, was held by Grotius to follow from it. The ideas of neutrality entertained in his age allowed a lawful ulterior destination to be furnished by the purpose of carrying on a just war in the region to be reached by the passage claimed. But now that a neutral may not concede transit to the armed forces of any belligerent, be his cause just or unjust, a hostile destination to an enemy's country affects the country of passage in the very serious point of the performance of its neutral duties, and it is agreed that the rights on international rivers do not extend to ships on an errand of war.

Very soon after the publication of the great work of Grotius, Art. 14 of the treaty by which Spain in 1648 acknowledged the independence of the United Netherlands closed the Scheldt on the side of the latter, a measure which was maintained against Austria in 1713 when the Spanish Netherlands were ceded to her by the treaty of Utrecht, and from which in 1784 the emperor Joseph II vainly attempted to free his states. Thus communication with oversea countries, whether under the Spanish or Austrian or under a foreign flag, was denied to the provinces now forming part of Belgium[1]. And for nearly two centuries the tendency, both of thought and of action, was to support the principle of Grotius only so far as it operated in favour of riparians, and to give to the latter not merely the right of passage but also that of sharing in the river traffic commencing or terminating at one another's ports. In Roman law navigable rivers were public, that is they belonged to the state for the general good of its subjects, and as this doctrine was applied to the shadowy state unity of Germany, the result lay in the direction of a free common use of German rivers by Germans but not by outsiders, though even that narrower aim was far from being practically realised[2]. Then the wars of the

[1] The Dutch argued that the channels by which the waters of the Scheldt reach the sea across their territory were made navigable only by their industry and expenditure, and ought therefore to be regarded as artificial communications and not as natural river courses.

[2] See the piece on the international law of rivers in the 2nd volume of Holtzendorff's *Handbuch des Völkerrechts,* which is by Carathéodory,

French revolution and empire produced many territorial changes embodied in treaties dealing with the rivers affected by them, and in these the freedom of the river navigation for the coriparians was repeatedly affirmed. Thus the practice seemed to be assuming the shape of what has been called a *condominium* of the coriparians, in favour of which the legal argument was enforced by that from the reciprocity which it established between them mutually, while excluding those who, being external to the river, would not be on a reciprocal footing with the riparians.

But the very denial of the Grotian principle by the closure of the Scheldt provoked the reaction which was to give that principle a currency which it had not before attained. By a decree of the French convention, 16 November 1792, the Scheldt was declared open because "a nation cannot without injustice pretend to the right of exclusively occupying the channel of a river, and hinder the neighbouring peoples who border on its higher shores from enjoying the same advantage." Thus the Scheldt was opened, and as it proved finally, in pursuance of a doctrine which would give to a riparian state the right of free communication with oversea states, under their flags if it chooses to receive them as well as under its own flag. And on the fall of Napoleon the allied sovereigns placed themselves in line with the more advanced opinion, declaring, by Art. 5 of the treaties of Paris in 1814, that "the navigation on the Rhine, from the point at which it becomes navigable to the sea and reciprocally, shall be free, so that it cannot be prohibited to any one"; also that "it shall be examined and decided in the forthcoming congress how, in order to facilitate communication between peoples and render them continually less strange to one another, the preceding disposition may be equally extended to all rivers which in their navigable course separate or traverse different states." The congress of Vienna

who (p. 292) quotes from the capitulation on the election of Francis II "also no exclusive right of navigation" (Art. 7, §§ 1, 3), and "that ships may pass up and down unhindered, and that one Order may not less than another avail itself according to right and equity of the magnificent opportunities provided by God and the benefits conferred by nature herself" (Art. 8, §§ 6, 7).

however fell a little short of this promise. By Art. 108 of its Act the coriparian powers of each river engaged to regulate every thing relating to its navigation by their common agreement, taking for base the principles laid down in the following articles; and by Art. 109 it was declared that the navigation on each river, from the point where it becomes navigable to its mouth, shall be entirely free, and cannot in respect of commerce be prohibited to any one. A comparison of this language with that which had been used the year before shows the substitution of the phrase "to its mouth" for "to the sea," the introduction of the phrase "in respect of commerce," which at first sight might seem to mark a contrast with the passage of ships destined for war but which might also serve to contrast commerce with navigation, and the reference of the whole to regulations to be laid down by the coriparians without the intervention of outside powers. The wording seems to have been skilfully chosen in order to mask a retreat, intended by some members of the congress, to the ground of *condominium*[1].

[1] The special articles with regard to the Rhine which were annexed to the Act of the congress of Vienna provided for the free navigation of that river *jusqu'à la mer*, but only *sous le rapport du commerce*; and the minutes of 3 March 1815 record that the other members of the commission saw no reason for adopting an amendment of those articles proposed by Lord Clancarty, because the wording adopted *ne semblait pas s'éloigner des dispositions du traité de Paris, qui ne visaient qu'à débarrasser la navigation des entraves qu'un conflit entre les états riverains pouvait faire naître, et non de donner à tout sujet d'état non-riverain un droit de navigation égal à celui des sujets des états riverains, et pour lequel il n'y aurait aucune réciprocité.* There was no substantial difference between the wording adopted and that proposed by Lord Clancarty except that the latter would have declared the Rhine free *au commerce et à la navigation de toutes les nations*, so the majority of the commission would seem to have relied on the omission of freedom of navigation, as distinguished from freedom of commerce, for preventing the articles as to the Rhine from securing the complete liberty of oversea traffic, notwithstanding the use in them of the wording *jusqu'à la mer*. In that case they must have put a similarly restrictive interpretation on the words *sous le rapport du commerce*, where they are used in Art. 109 of the Act for defining the general doctrine; and M. Engelhardt, in his article on *La Liberté de la Navigation fluviale* in the *Revue de D. I. et de L. C.*, t. 11, while combating the restriction, admits it to follow from the minute that it was intended by the words in question to exclude foreign flags: p. 365. But this will not explain the

During the forty years which succeeded the congress of Vienna the navigation on European international rivers continued to be regulated by conventions of the coriparian powers which in general did not admit the foreign or oversea flag. Such were the conventions of the German powers as to the Elbe (1821), the Weser (1823) and the Ems (1843), and the Austro-Russian convention (1818) as to the Vistula, the Dniester and the Pruth. The Act of 1831 as to the Rhine was so stringent that Prussian vessels, commanded and manned by Prussians, could not carry on direct intercourse between the Prussian ports on the Baltic, as Stettin, and on the Rhine, as Cologne[1]. But the conventions as to the Po (1849, between Austria, Parma and Modena; 1850, accession of the Pope; 1851, Austria and Sardinia) admitted the universal equality of flags, and so did the arrangement as to the Scheldt, the opening of which would otherwise have been of small advantage to Antwerp. On the other hand the convention as to the Elbe did not admit even the coriparians to the river traffic commencing and terminating in the same state, only to that between river ports in different states.

The congress of Paris in 1856, dealing with the Danube, brought on the scene a river in the navigation on which the interests of oversea powers bore a greater ratio to those of the

reference in the minute to the treaty of Paris, for the words *sous le rapport du commerce* do not occur there. In giving a restrictive interpretation of that treaty the majority probably betrayed the fact that, in the mean time, they had recovered the courage necessary for resisting the wave of opinion which in the first enthusiasm attending the victory of the allies had carried them away; and they may have been prompted by that change of their attitude to substitute *jusqu'à son embouchure* for *jusqu'à la mer*, in the general provisions though not in those for the Rhine. The article by M. Engelhardt here referred to forms a chapter in his work *Du régime conventionnel des fleuves internationaux.*

[1] See the article by M. Engelhardt referred to in the last note, of which much use has been made in this chapter, p. 366. The learned author says, p. 374, that the coasting traffic is not prohibited to outsiders on the lower course (*le parcours inférieur*) of any conventional river, and he quotes as examples the Elbe between Hamburg and Cuxhaven, the Weser between Bremen and Bremerhafen, and the Dutch part of the Rhine. This makes an exception to the statements which we have borrowed in the text.

riparians than had been the case in any previous instance, and the treaty which resulted provided as follows.

"Art. XV. The Act of the Congress of Vienna having established the principles intended to regulate the navigation of rivers which separate or traverse different states, the contracting powers stipulate among themselves that those principles shall in future be equally applied to the Danube and its mouths. They declare that this arrangement henceforth forms a part of the public law of Europe, and take it under their guarantee. The navigation of the Danube cannot be subjected to any impediment or charge not expressly provided for by the stipulations contained in the following articles: in consequence there shall not be levied any toll founded solely upon the fact of the navigation of the river, nor any duty upon the goods which may be on board of vessels. The regulations of police and of quarantine to be established for the safety of the states separated or traversed by that river shall be so framed as to facilitate as much as possible the passage of vessels. With the exception of such regulations, no obstacle whatever shall be opposed to free navigation."

Provision was made for the execution by the joint action of the great powers of the necessary works for clearing the access to the Danube from the Black Sea, and a commission of the riparian powers appointed by the treaty drew up regulations dated 7 November 1857, by which the navigation between the sea and all river ports was to be open, in either direction, for the flags of all nations, but the traffic between river ports was to be open for all the coriparians and for them only. This certainly did not correspond with the express declaration of the treaty that no obstacle whatever should be opposed to free navigation except for police and quarantine, and the regulations were consequently disallowed by the great powers assembled in conference at Paris in 1858, the powers expressing characteristic opinions on the possibility of justifying the conclusions of the commission by the reference which the treaty had made to the Act of the congress of Vienna. Austria-Hungary, interested as a riparian, defended the regulations as consistent with the minutes of 3 March 1815. Prussia, interested as a riparian in the German rivers of the north but not in the Danube, agreed in the interpretation of the Act of Vienna but held that the treaty of Paris had applied a more liberal system to the Danube. England, true to the view she took in 1815[1], rejected the restrictive

[1] See note, p. 147, for the amendment proposed in 1815 by Lord Clancarty.

interpretation of the Act of Vienna. France also rejected that interpretation, observing that any doubt which could exist about it was set at rest by the primitive and fundamental disposition of the treaty of 1814, which bore in substance that the navigation on the Rhine and on all other international rivers should be free, so that it cannot be prohibited to any one. In the result, the lower Danube is open to the foreign or oversea flag as far as the seagoing vessels which in fact navigate it can ascend, without any restriction of the traffic in which they may engage, and on the whole of the river the traffic between river ports, whether of the same or of different states, is open to all the coriparians. What has been thus stated as to the Danube is also the actual condition of the Rhine, except that under the convention of 1868 the admission of the foreign flag is practically qualified by the necessity of the vessel being certified as fit for the river navigation, and of her being piloted by a person domiciled in one of the riparian states and certified by it. But there had been points in the history of the Rhine which require special mention. After the separation from that river of the Waal and the Leck, which join the different branches of the Meuse and lose their names in those of the latter and of the channels connected with it, the stream which continues the name of the Rhine is insignificant, and the passage from it to the sea and inversely is intercepted by the sluices at Katwyk. It was therefore agreed, first that the Leck, and afterwards that the Waal, should be substituted for the nominal Rhine in respect of international navigation, Holland representing this as an act of grace since, according to her, the conventions only applied to the latter. And even on the Waal she closed the international navigation at Gorcum, where the tide begins and the name of Waal ceases, which she said satisfied the words *jusqu'à la mer*. But both the outside and the riparian powers contended that those words meant "into" and not merely "as far as" the sea, an interpretation which the conventions for the Elbe and the Weser had already adopted by saying *bis in die offene See*, and that the stipulations as to the Rhine could only be satisfied by the freedom of the real outlets of its water. By the convention of Mayence in 1831 Holland conceded the freedom of the mouths leading by Helvoetsluis and

Briel to the Waal and the Leck, and undertook, in case of their becoming obstructed, to open for the international navigation passages as convenient as those which should be used by her own subjects.

Passing from Europe to America, we may first notice that in the treaty of 1783, by which Great Britain acknowledged the independence of the United States, the right to navigate the Mississippi in that part of its waters which belonged to the latter was secured to British subjects, but that that stipulation was not repeated in the Anglo-American treaty of 1815. At the former date the Mississippi was erroneously believed to rise in the territory which remained British, and even otherwise it fulfilled the geographical conditions of an international river, Spain being already the sovereign of its mouth on one side, and by the arrangements of 1783 becoming such on the other side also; though it is probable that the position of Spain at the mouth would not alone have dictated the stipulation, since, had the true source been known, England would have been seen to be an outsider to the navigation. By the latter date the river was known to lie entirely in the territory of the United States, which had acquired its mouth. The international rights in its navigation, whether founded on mistaken geography or on real conditions, lapsed with the mistake or the conditions, and a river being and known to be comprised within a single state could not be treated in an exceptional manner on account of its past history. So also the Po, since it became exclusively Italian in geography through the acquisition of Venice by Italy, has been subject in its navigation to no rights but those of Italy[1].

On the Mississippi while Spain possessed its mouth and claimed the western bank of its higher course, and on the St Lawrence of which the lower course lies in a British posses-

[1] Fiore (vol. 2, pp. 63, 64), Rivier (vol. 2, p. 228), and perhaps Carathéodory (2 Holtzendorff 303) though his words may admit of a less extensive interpretation, maintain that territorial changes transforming an international river into one comprised within a single state have no effect on the liberty established upon it for different flags during its international existence. They quote the treaty of Zurich, by which Austria ceded the Milanese but the conventions as to the Po were maintained. But Austria continued to possess a part of the Po until her cession of Venice.

sion, the question of international rivers presented itself to the United States as against Spain and England in circumstances differing in some respects from those which had attended the European controversies. No common use of the river by coriparians, however restricted, had been growing up, as in the dominions which acknowledged the Holy Roman Empire or on the frontiers of that empire and France; no appeal to the Roman law by which rivers were in the public domain of the state would have had any meaning. There was nothing to lead the thoughts to a *condominium* in which the right of navigation on each part of the stream as well as the appropriate regulations for it should depend on a vote of the coriparians of the whole. The claim made was simply that of Grotius and Vattel to innocent passage through the territory of another state, and was supported as by them on philosophical grounds concerning the original constitution of sovereignty, a little qualified in statement by the absence of any state other than the coriparians which might have an interest such as the maritime powers of Europe have in the greater rivers of that quarter of the globe although not bordering on them. The United States contended that the freedom of the ocean to all men and of rivers to all the riparian inhabitants was a sentiment written in deep characters on the heart of man; that the authority of this natural law was augmented by the fact that when the inhabitants of the lower part of a river excluded those of the upper part from its navigation, this was only the triumph of the strong over the weak, and was condemned as such by society in general. It was true that the right claimed was an imperfect one, because its exercise must be dependent to a considerable degree on the conveniency of the nation through which persons using it were to pass, but if it were refused, or so shackled by regulations not necessary for the peace or safety of the inhabitants as to render its use impracticable, an injury would be inflicted for which it would be proper to exact redress[1].

[1] See Jefferson's *Instructions to the Ministers of the United States in Spain*, Waite's *State Papers*, vol. 10, p. 135 &c.; and *British and Foreign State Papers*, 1830–1, pp. 1067–75. The arguments are summarised by Wheaton, *History of International Law*, 4th period, § 21, and by Hall, § 39.

As this is the first occasion on which we have met with the class of imperfect rights, it will be well to pause and consider it. Within a state, legislation is largely occupied with giving effect to claims to ignore which it is felt would be a violation of attributive justice, yet which would cause great inconvenience if their assertion was not fenced by definition and limitation. But it is unnecessary to notice those claims in their original undefined and unlimited condition, because the legislator is on the spot, ready to supply whatever precision is required. An illustration is furnished by the claims of inventors and authors, which are recognised by the laws of patent and copyright so far as is deemed compatible with the general good, and cannot be entertained any further by the courts of justice. Thus the distinction between moral and legal rights is well marked, even when the former depend on that particular virtue, justice, which is most intimately connected with law. But since in the society of states there is no legislature beyond the very imperfect one of custom and agreement, which may establish principles but is little fitted to define practical details, much injustice would be done if rights not clothed with all the precision desirable for action on them were dismissed as summarily as they are dismissed by the internal law of a state. It is necessary to introduce a class of imperfect rights between those which are merely moral and those which are perfectly legal.

Besides the navigation of international rivers, the extradition of criminals may be taken as in point. As we have said elsewhere: "Doctrine may lay down that extradition ought to be granted only for grave crimes, but it cannot determine precisely for what crimes. It may lay down that a *prima facie* case ought to be made out against the person accused, but not precisely what evidence not satisfying the usual requirements of the court ought to be received from abroad for that purpose.... Doctrine may lay down that a state ought not to bar the peaceful passage across its territory along a river, or hamper it by customs duties, but it cannot determine the measure in which those who use the passage ought to contribute to the cost of maintaining the navigation, or the regulations to which they ought to be subject for the security of the state across which they pass. Therefore extradition and the peaceful navi-

gation of international rivers must be imperfect rights in the sense that conventions are indispensable to their due enjoyment. But it does not follow that there is in them no element of law....If a state persistently refused to conclude proper conventions for extradition or to surrender fugitive criminals without them, it is not to be supposed that other states would put up for ever with its being an Alsatia, rendering the due repression of crime within their own limits impossible. Nor is it to be supposed that states desiring commerce with one another... would feel themselves bound to forego it for ever because a state across the territory of which it was necessary to pass along a navigable river was persistently churlish[1]." Reserving until we have completed the history a final answer, such as assumed in the last words, to the question whether a right of the kind can be claimed as already established on international rivers, sufficient reason seems to have been shown for the admission in the society of states of a class of imperfect rights, to which the element of law is contributed by the support which powers taking in extreme cases their remedy in their own hands would receive from that society, so that the true description of the rights in question is imperfect legal rights.

The American argument therefore appears to us to have been well founded. The answers made to it, which so far as England was concerned were inconsistent with the stipulations to which her supposed possession of the upper Mississippi led in 1783, were based in substance on the rejection for practical purposes, between states as well as before the internal courts of a state, of natural law or attributive justice, and of the doctrine of imperfect international rights which springs out of it. Rights on international rivers were derogations from territorial sovereignty, and were not merely shaped by international conventions but drew their origin from them. The fundamental constitution of sovereignty contained no exception for innocent passage on rivers, and the United States' claim to navigate the lower St Lawrence was no better founded than would be a Canadian claim to carry goods to the Mississippi, the Ohio or

[1] *Chapters on the Principles of International Law*, pp. 74, 75.

the Hudson, either by land or by the canals in the United States, and thence down those rivers to the sea[1].

In the result, Spain, by the treaty of San Lorenzo el Real in 1795, opened the navigation of the Mississippi to citizens of the United States, reserving the right to extend it to other powers. And after various changes in the conventional situation the Anglo-American treaty of Washington in 1871 secured the usual international rights of navigation not only in the St Lawrence but also in the Yukon, Porcupine and Stikine rivers and in the St Clair Flats canal, while England undertook to urge on the dominion of Canada, and the United States to urge on the several states of the Union, that they should secure to the opposite party the use on terms of equality of the other canals connected with the navigation of the St Lawrence.

On the South American rivers, mainly in consequence of the great commercial interests of England, France and the United States, the flags of all nations and not merely those of the coriparians have been admitted[2].

By the General Act of the African Conference of Berlin of 1885 it is provided:

"Art. 2. All flags, without distinction of nationality, shall have free access to the whole of the coast-line of the territories above enumerated, to the rivers there running into the sea, to all the waters of the Congo and its affluents, including the lakes, and to all the parts situate on the banks of those waters, as well as to all canals which may in future be constructed with intent to unite the watercourses or lakes within the entire area of the territories described in Article 1. Those trading under such flags may engage in all sorts of transport and carry on the coasting trade by sea and river, as well as boat traffic, on the same footing as if they were subjects.

"Art. 3....All differential dues on vessels as well as on merchandise are forbidden."

The territories to which the articles here quoted apply are those constituted by Art. 1 as a region of free trade, subject to a discretion which the same article reserved to powers already owning territory in a portion of that region; and this leads us to

[1] *British Paper on the Navigation of the St Lawrence*; Congress Documents, no. 43.

[2] For the treaties and the emperor of Brazil's decree of 1867 see Calvo, §§ 280–289.

an important utterance of Lord Salisbury with regard to the rights on international rivers. In 1888 the British settlements on the Shire, an affluent of the Zambezi, were in danger from Arab slave raiders, and the British government asked Portugal, to which the lower part of the Zambezi was agreed to belong, to permit its subjects, but not the Arabs, to receive munitions of war by way of the rivers. Portugal, which at the time was in an acute state of rivalry with England as to the region in question, claiming for herself the soil of the British settlements on the Shire, prohibited the passage of munitions of war both to them and to the Arabs. There was no doubt that the rivers, so far as properly Portuguese, were included in the discretion above referred to as reserved by the conference, but there was a question whether Portugal had not engaged herself to exercise that discretion in favour of the freedom of navigation on them. In those circumstances Lord Salisbury on 25 June 1888 addressed a despatch to Mr Petre, the British minister at Lisbon, in which he said: "but even if she [Portugal] had given no such pledge, this country could not admit her right to inaugurate a system which would practically result in the exclusion from the waters over which she has control of all British ships wishing to pass beyond those waters. Sir J. Fergusson's remarks in the House of Commons were in this sense, and I should wish you to state to Senhor Barros Gomes that they accurately expressed the views of Her Majesty's government[1]."

This pronouncement must be read in connection with the fact that a convention as preliminary to the international use of a river, important as it certainly is for preventing the abuses likely to attend unregulated navigation through a populous country, could be little needed in the case of so wild and thinly peopled a region as that of the lower Zambezi. So read, the pronouncement ranks the British government in line with the doctrine of Vattel as applied to rivers not confined to a single national territory, and with the United States' argument on the North American rivers, both treating the right of innocent passage along them as a real one, and in the case of necessity to be used on the responsibility of the state asserting

[1] *Parliamentary Paper* c. 5904, p. 43.

it, although normally to be completed by agreement with the territorial sovereign; in other words, an imperfect right.

We may now look back on the history which we have traced, and ask whether it does not amount to such an acceptance of that right by the civilised world as makes international law by the consent of states. We have seen the right carried into practical effect in Europe, America and Africa, by a series of conventions so numerous as to imply strongly that they rest on a common principle, and without limitation to the coriparians wherever the interest of outside powers has been sufficient to induce them to intervene. This was accompanied in 1814, 1815 and 1856 by expressions pointing to the general application to all rivers of the principle that was being applied to some rivers on the respective occasions; and if in 1815 there was hesitation on the part of some powers as to whether the principle included any but coriparians, the pronouncement of 1856, which included outside states in its benefit while citing that of 1815 as precedent and authority, and was followed up in 1858 by the rejection of narrower regulations, put for the future the larger construction on the Act of Vienna. In 1885 the principle was applied, and in its largest construction, to the acquisitions thenceforth to be made in a vast region, leaving to the powers already established within its limits an option naturally resulting from the fact that the mission of the conference was only to deal with parts still unoccupied. Lastly, the principle has taken a progressive hold: enjoyment has been claimed as an imperfect right by Great Britain, which once maintained that convention was its only origin. We conclude that a sufficient consent of states exists to warrant the assertion that a right of navigation, of which the best statement is that made for the Danube by the treaty of Paris in 1856[1], exists as an imperfect right on navigable rivers traversing or bounding the territories of more than one state[2].

[1] See above, p. 152.

[2] There were certain tolls on German rivers, granted by emperors of the Holy Roman Empire or by simple kings of Germany in the remote times when that country had not yet been broken up by an exaggerated feudalism, or believed to have been so granted because their origin was

In tabulating the opinions of accredited authors on the subject, the important distinction is between (A) Those who deny the right of innocent passage, referring the matter entirely to convention, and consequently allowing the territorial state to refuse the passage or to exact a price for it; with whom must be classed those who assert a duty on the part of the territorial state to allow the passage subject to a reasonable convention, but make that state the final judge of its duty; and (B) those who assert the right of innocent passage, of course normally to be regulated by convention, but so that a clearly wrongful refusal by the territorial state may be resented as an injury. Among the authorities in the respective classes the following may be mentioned, subject to some doubt as to one or two whose language does not lend itself easily to this classification.

(A)—Klüber, *Droit des Gens*, §§ 76, 135;
G. de Martens, *Précis*, § 84;
Heffter, § 77;
Calvo, §§ 291, 293;
F. de Martens, vol. 1, § 101;
Phillimore, vol. 1, § 160;
Twiss, *Law of Nations* (*Peace*), § 145;

Hall, § 39.

lost in antiquity. Some of these existed down to a time later than 1815, and the reader who may meet with them in the midst of the international history of the rivers in question must be cautioned against supposing that they are inconsistent with that history as traced in the text. They were proprietary rights acquired under an authority which at the date of their inception was a national one, and, as such, had survived to times when the relations of the rivers on which they were levied and of the surrounding territories had become international; as anachronisms, they had to be suppressed with compensation. The most remarkable instance was that of the Stade or Brunshausen toll, levied on the Elbe below Hamburg, from which the Hamburgers obtained an exemption in 1189, confirmed in 1268, but which continued as against others and became vested in the king of Hanover. It was regulated in 1843 by a convention of the coriparians of the Elbe, and suppressed in 1861 for compensation, by a general European treaty and a treaty between Hanover and the United States. See Twiss, *Law of Nations* (*Peace*), § 156.

(B)—Grotius, l. 2, c. 2, § 13;
Pufendorff, l. 3, c. 3, n. 5–8;
Vattel, l. 2, § 130;
Bluntschli, *Droit International Codifié*, § 314;
Geffcken, on Heffter § 77—"free passage to all, but at least to all coriparians";
Engelhardt, *R. de D. I. et de L. C.*, t. 11, p. 372;
Carathéodory, in Holtzendorff's *Handbuch des Völkerrechts*, vol. 2, § 60;
Fiore, § 794;
Rivier, t. 1, p. 226;
Despagnet, § 428;
Ullmann, § 94;
Institute of International Law, Heidelberg resolutions, *Annuaire* 1887–8, p. 182;
Wheaton, *Elements*, § 193.

It remains to notice a point on the navigation of international rivers about which there is universal agreement wherever the right itself is admitted to exist, and for the statement of which Wheaton's words may conveniently be borrowed. "It seems that this right draws after it the incidental right of using all the means which are necessary to the secure enjoyment of the principal right itself. Thus the Roman law, which considered navigable rivers as public or common property, declared that the right to the use of the shores was incident to that of the water, and that the right to navigate a river involved the right to moor vessels to its banks, to lade and unlade cargoes, &c. The public jurists apply this principle of the Roman civil law to the same case between nations, and infer the right to use the adjacent land for these purposes, as means necessary for the attainment of the end for which the free navigation of the water is permitted[1]."

[1] *Elements of International Law*, § 194.

Notes to Chapter VII.

Page 148. The General Act of the West African Conference of Berlin, Art. 26, declared the navigation of the Niger to be open to the merchant ships of all nations, therefore, by implication, not to their ships of war; but Art. 22 of the same act contemplated the possibility that ships of war of the signatory powers might enter the Congo. This difference may be explained by the fact that Great Britain and France were already established on different parts of the Niger, while the Congo was unappropriated until the recognition of the International Association of the Congo was completed by its being admitted to adhere to that act, and was therefore regarded in drafting the act as being unappropriated. The liberty contemplated in Art. 22 does not, in our judgment, apply to the Congo, now an international river. See however Duchêne, 2 R. G. de D. I. P. 439, for the view that ships of war have an equal right with merchant ships to the navigation of international rivers, and that therefore the mention of merchant ships with regard to the Niger in the Act of Berlin cannot have been intended to be exclusive.

Page 162. The subject of rivers in international law ought not to be dismissed without a mention of the questions which arise where a river flows from one state into another. They seem to be such that general principles will not carry the matter very far. One is tempted to say that the upper state ought not to diminish the natural supply of water to the lower state, but then the thought at once arises that there are cases in which water is consumed by fair use, as by irrigation in a climate in which the water dispersed for the purpose of irrigation is evaporated. Perhaps the only rule to which it is difficult to foresee an exception is that the discharge of water across the boundary ought not to be so regulated, or left unregulated, by the upper state, as to incommode the lower state by floods, or to increase its natural liability to be incommoded by them. The matter is dealt with in numerous arrangements made between states or cantons, which ought to be studied by any one who desires to write on it.

CHAPTER VIII.

THE SEA.

The Open Sea.

We shall have to speak in their place of certain portions of the sea more or less nearly adjoining the land which are deemed to be comprised in the sovereignty over the land and are therefore called territorial seas. The rest of the waste of waters is called the open or high sea and no sovereign has any territorial right over it, in other words it is not the subject of sovereignty. A foundation has been sought for this in the Roman law, which declared the sea not to be the subject of private property but to be public[1]. The Roman lawyers however who laid this down were thinking of the relations between individuals and the one state which they had in contemplation, not of those between state and state. And if it were attempted to apply the argument by analogy to states, as individual members of the greater commonwealth, it would prove too much, since it would condemn the sovereignty over territorial seas no less than that over the open sea. The true foundation of the rule that the open sea is not the subject of sovereignty is the fact that it is not capable of occupation. The area over which a ship of war can exercise control from her momentary position is insignificant when compared with the vast expanse of the ocean, and her control even over that area is not permanent. The possession established by her ceases in fact as soon as she has left her station, and the power

[1] And this the Roman lawyers held to be in virtue of the *jus naturale* or *gentium*: Just. *Inst.* 2, 1, 1 and 5.

of reproducing it at the same station depends on too many contingencies to be that constant power to reproduce at will a possession which has ceased in fact, which is necessary to the continuance of the right[1]. It is because the physical power of occupation is immeasurably greater in the waters more or less nearly adjoining the land, where it is reinforced both by the works on the land and by the coastguard service which all maritime nations employ in those waters, that sovereignty is there admissible.

Nevertheless history is full of claims to sovereignty or dominion over the open sea, or to property in it, under which name we have seen that sovereignty often passed, or to rights over it which could have no foundation except in sovereignty. The claims of Spain to the Pacific ocean and the gulf of Mexico and of Portugal to all the Atlantic south of Morocco and to the Indian ocean, accompanied by prohibitions to all foreigners from navigating or enetring the respective waters, were the most outrageous of any, in respect both of their geographical extent and of their refusal even of innocent passage. They were repudiated and practically set at nought by the Elizabethan English and by the Dutch, and called forth the *Mare Liberum* of Grotius, to which Selden replied by the *Mare Clausum* in support of the much narrower but still extravagant pretensions of England. Venice claimed the northern part of the Adriatic, in which we may detect an application of the principle of gulfs, notwithstanding the width of the gulf in question and its not being wholly bordered by Venetian lands, and exacted a heavy toll from vessels navigating it, to which Bologna and Ancona were obliged to submit after resisting it by war. England exacted a humble salute to her flag from Cape Finisterre in Spain to Stadland in Norway, and obliged the Dutch to concede it in their treaties with her under the Commonwealth and

[1] See above, note on p. 96. The argument from the fluidity of water, which has sometimes been advanced to prove the sea incapable of occupation, is a poor one. The fluidity of the atmosphere would equally prove that sovereignty over land cannot extend *usque ad coelum*. The power to occupy a place is different from the power to prehend manually or to confine what is in the place.

Charles II, and she required foreigners intending to fish in the German ocean to take out English licenses, but she did not refuse or tax innocent passage, nor does that seem to have been done in any cases but those which have been mentioned[1]. Henry VII of England conceded the Danish claim to require licenses to be taken out for fishing in the sea between Norway and Iceland, and that claim was only dropped in the eighteenth century in consequence of the opposition of England and Holland to it. But the dues, substantial or honorary, which were paid by foreigners for the use of the appropriated seas in past times were compensated in some measure by the obligation to defend those seas against pirates which was generally understood to fall on the appropriators and was not as a rule neglected by them. On the other hand, two of the most remarkable claims over the open sea have been made since piracy has ceased to be a formidable evil. By the ukase of 1821, in order to protect the Russian settlements in America from disturbance and competition, the czar Alexander forbade foreign vessels to approach their coast within less than a hundred Italian or nautical miles; and in a note of 28 February 1822 M. Poletica, the Russian minister at Washington, asserted that his government might claim sovereignty over the whole of Behring's sea and the Pacific ocean between its Asiatic and American territories as a *mer fermée*, but "preferred only asserting its essential rights without taking any advantage of localities." The prohibition and the pretension to sovereignty were equally set aside by the Russian conventions of 1824 with the United States and 1825 with Great Britain, following the protests of both those countries. But the example of claiming the advantages of sovereignty without the odium of its name was not lost, and in 1889 the United States, which had purchased Russian America, legislated against killing any fur-bearing animal in so much of Behring's sea as lay on their side of the limit agreed on between them and Russia for the sovereignty over islands in it, as being hurtful to the sea fishery

[1] The case of the Sound dues belongs to the law of straits. Other examples of the appropriation of the open sea in past times are mentioned, with a good summary of the history, in Hall, § 40.

on their islands[1]. The attempt however was defeated by the arbitrators appointed under a treaty with Great Britain, who awarded in 1893 that "the United States have not any right of protection or property in the fur seals frequenting the islands of the United States in Behring's sea, when such seals are found outside the ordinary three miles limit."

The Legal Character of Ships.

But although pretensions to sovereignty over any part of the high sea are now obsolete, it would be an error to conclude that state sovereignty is not present at occurrences on the high sea and concerned in them. Those occurrences take place between or on board ships, each of which in the general rule belongs to a state of which she carries the flag, and is subject entirely and exclusively, so long as she is on the high sea, to the authority of that state, exercised by its ships of war as occasion requires, but regularly through the authority which even in the case of a merchantman is confided to her captain. The meeting of persons on the high sea has been compared to the meeting of travellers on land in a country where state sovereignty has not been established, but the comparison is misleading, or at least it can only hold if the land travellers on each side form part of a state expedition. Private travellers on land meet one another directly, and there is no state vehicle in the case. If one injures the other in a locality which does not belong to his state, his state is not responsible unless it has in some way made itself a party to the injury, and the injury is not done directly to the state of the other, although that state may intervene for the protection of its subject or the redress of his wrongs. Travellers at sea do not meet one another directly but ships meet, and any injury or usurpation of authority which either ship or any one on board her does or attempts to or over the other or any one on board her is done or attempted directly to or over the state which is represented in the latter by the authority which it has placed there, and

[1] The act of congress was "declared to include and apply to all the dominion of the United States in the waters of Behring sea," but this was understood and enforced by the government in the sense given in the text.

in most cases is done or attempted directly by the state authority on board the first ship. These truths are often expressed by saying that a ship, even a merchantman, is a floating part of the territory of her state, but that expression has the demerit of clothing in a fiction what can be conveyed with equal simplicity by stating the fact that a ship, no less than a territory, is a field of state action, state authority being present in her and on the high sea exclusive. Another fiction sometimes resorted to is that a ship, and her state by means of her, successively annexes by occupation the parts of the sea in which she floats from moment to moment. But this view has two faults besides the general objection to fictions. It does violence to the nature of occupation as a juridical act by attributing that character to any thing so fleeting as the momentary filling space in the course of a voyage, and it draws the attention away from the important point that state sovereignty is really present at an occurrence on the water, while fixing it on the unimportant question how far the locality of the occurrence can be likened to a spot on land. Such being the principles, it follows that action on the open or high sea by a ship belonging to one state or covered by its sovereignty, on or against a ship belonging to another state or covered by its sovereignty, is of the nature of intervention and is normally unlawful. But in the absence of local sovereignty it is only through systematised intervention that the high seas can escape being given up to anarchy, and it remains for us to see what rules on the subject have been established by reason, custom or treaties.

The Nationality of a Ship.

First, the nationality of a ship is that of the flag rightfully carried by her. If she is a public ship, that is if she is in the service of a state whether as a ship of war strictly so called, as a transport, or in any other capacity, and whether she is the property of that state or chartered by it, her flag is its military flag, and her right to carry it is vouched by the declaration of her commander and the production of his commission. In any other case her flag is the mercantile flag of her state, or some

special flag such as those granted to yacht squadrons, and her right to carry it is vouched by some public official document on board her, as the pass or sea letter, or the certificate of registry where the state keeps a register of shipping, a practice which began with England and is now common. The conditions on which different states admit ships to their register, or otherwise grant them the right to carry their mercantile flag, are very various, as that the ship shall have been built in their territory, or that she shall be owned in whole or in a certain proportion by nationals of the state or companies belonging to it, or that she shall be commanded and manned in whole or in a certain proportion by nationals of the state. But with such conditions international law has no concern: it suffices that, for whatever reasons, a state accepts the authority and responsibility which result from the ship's nationality. The responsibility can only be real if the ship belongs to a port of the state, on her return to which the captain, crew and passengers can be punished for any offences they may have committed at sea. Consequently an inland state cannot claim to have a mercantile flag entitled to international respect on the high seas, and Switzerland has not in fact made such a claim, although the federal council and federal assembly were of opinion in 1864 that a right to make it existed. But Swiss-owned steamers plying on the lakes between Swiss ports and French, German or Italian ports fly a Swiss flag, which is in accordance with principle, and the ships of all nations in the port of Nagasaki paid the usual respect to the Swiss flag hoisted by the Swiss envoy to Japan on his arrival there, which may be regarded as an international courtesy shown to the envoy[1]. If subjects of a state hoist its flag on a ship without its authority, or if they hoist no national flag at all, it may if it pleases protect them and accept the responsibility for their acts, but they have no claim on it, and they cannot as individuals claim any rights which belong to their state. During the civil war in the United States a Swiss citizen pretended that his ships under the Swiss flag were exempt from blockade by reason of the neutrality of Switzerland, an argument which would have been absurd even if that country had asserted the

[1] Twiss, *Law of Nations* (Peace), § 197.

right to a flag at sea, since to be neutralised is not to be privileged for blockade running, and the Swiss federal council declined to intervene on his behalf[1].

Visit and Search only a War right.

Where the flag of a state is rightfully carried by a ship on the high seas, the authority exercisable on board or over her, that is the right to give commands and use force in support of them, belongs exclusively to that state and is delegated by it to her captain or to its own superior officers afloat, with the two clear exceptions of war rights and self-defence, and a third perhaps doubtful exception for the case of pursuit lawfully commenced in territorial waters and continued in the open sea. To admit a conflict of authorities in any other case would be no less anarchical than to admit action by conflicting authorities at a spot on land. The war rights referred to are the absolute ones of an enemy, and the qualified ones allowed to belligerents as against neutrals for the purpose of enforcing blockades and preventing the carriage of contraband, formerly also for that of capturing enemy's property as such, including in each case the right of visiting and searching neutral ships for the purpose of detecting confiscable property and evidence in support of its confiscation.

These rights we shall have to consider in treating of war. here it is only necessary to say that they do not exist in time of peace, and that in time of war they are limited to the purposes which call them into being. Thus for the detection and suppression of the slave trade there is no right of visit and search by general law, but only by treaty between states which have conceded it to one another in their just hatred of that traffic, which, however abominable, has never been regarded as an international offence. It was practised by all the nations between whom international law arose, and the unhappy peoples who suffer from it do not belong to the relatively civilised ones between whom international duties are considered to exist[2].

[1] Twiss, u.s.

[2] See above, p. 91. See *Le Louis*, 2 Dodson 210, for a vigorous judgment of Lord Stowell to the effect that visit and search is exclusively a war right, and that the slave trade is not forbidden by international law.

Thus too the pretension formerly maintained by Great Britain, to take seamen whom she claimed as her subjects out of ships of foreign and friendly nationality, was abusive even when her officers boarded those ships in the exercise of the war right of visit and search.

Self-Defence on the open sea in time of Peace.

The other case in which on the high seas the flag clearly does not exclude the forcible exercise of authority on board by another state is that of self-defence, which arises when under cover of the flag a hostile enterprise is attempted against the state which intervenes. It is of no consequence how far the enterprise may be from its completion, if it is already in course of execution. Suppose for instance that a hostile landing is intended on a still distant coast of a friendly state: a ship of the latter, capable of defeating at once the unlawful voyage, cannot be expected only to follow the evil-doer into territorial waters, thereby giving him many chances of escape, or even of successfully carrying out the intended injury. Thus in 1873 the Spanish ship of war Tornado arrested on the high seas the Virginius, fraudulently registered in the United States as the property of a citizen but in fact belonging to Cuban insurgents, in support of whom she was on her way to Cuba, then belonging to Spain. The Virginius was brought into a port of the island in possession of the Spanish government, and there many United States citizens and some British subjects, found on board her, were shot without any other trial than by court martial. The British government, in demanding reparation for this treatment of its subjects, did not complain of the seizure of the Virginius, or of the detention of the passengers and crew. And this admission of the right of self-defence has been justified by the best authorities of the United States who have since written on the case[1]. But between the governments of that country and Spain the discussion proceeded on less satisfactory grounds. The latter inaccurately asserted that the capture had been made in its territorial waters, and, if that were not the case, pleaded the

[1] *The case of the Virginius considered with reference to the law of Self-Defence,* by George T. Curtis, and Woolsey, § 214, quoted by Taylor, § 406.

fraud by which the register of the former had been obtained. The attorney-general of the States very properly held that the arrest of the ship by a foreign power could not be justified on that ground, but, interpreting a protocol which had been signed as an agreement to admit it in principle, he decided on the facts that the Virginius was carrying the American flag without right, and the matter was amicably arranged. The nationality with which a ship has been invested by the authorities of a state must govern her treatment as a ship wherever that treatment depends on her nationality, as in a case of self-defence it does not, and if a foreign government thinks that in so investing her those authorities have been imposed on or have otherwise erred, to its damage, it must make its complaint to their state.

The doctrine here taught is not that which Dr Hannis Taylor quotes as follows from Mr Dana: "Nations having cause to arrest a vessel would go behind such [a fraudulent register] to ascertain the jurisdictional fact, which gives character to the document and not the document to the fact....The register of a foreign nation is not, and by the laws of nations is not, recognised as being a national voucher and guarantee of national character to all the world." Nor are we convinced by Dr Taylor's own adhesion to Mr Dana's view: he says that "the true doctrine is that a [fraudulent] register is only *prima facie* evidence of nationality, which any state may challenge at its peril when its interests are involved[1]." To maintain that view it would be necessary to show what is "the jurisdictional fact" which gives to a ship the nationality evidenced by its register or sea letter, if it is not the very grant of that document by public authority; and this it would be impossible to do in face of the great diversity of the conditions which different states exact for the enjoyment of their flag. If all the owners, the master and all the crew, are of one country, and the ship was also built in that country, a nationality may be assumed for her with a misleading facility. But what if a state to which all the owners, master and crew, as well as the country in which she was built, are foreign chooses for some end of its own to accept the

[1] § 405. Mr Dana is quoted from "a Boston Journal of January 6, 1874," a date which shows that he was writing with reference to the case of the Virginius.

responsibility for her: why can it not do so? And if it does so, what responsibility can lie on any other state for what its subjects have done outside its territory? It would be another question if a register were fraudulent in the sense of being forged, never having really been granted. Those sailing under it might then, no doubt, be treated as covered by no flag at all. But if the register is fraudulent in the sense of having been obtained by imposition on the authorities concerned, then the true remedy for any trouble which the ship may occasion surely lies in the principle of self-defence if the trouble is immediate, and as against more remote contingencies in appealing to the state of which the flag has been improperly obtained.

We have spoken in this section of the right of self-defence, and of hostile enterprise and immediate trouble as calling it into play. It remains to give this language as precise a meaning as it admits of. The employment between states of physical means (*voies de fait*) does not always stand on one and the same footing. If a physical injury is directed against the territory, property or acknowledged rights of a state or its subjects, physical prevention of it presents a true case of self-defence and is justifiable. Since international law does not provide the means of safeguarding the rights which it gives, it cannot be supposed that when it gives a right to a party who has the means of guarding it from violation it requires him to abstain from using those means. This will cover the case of the Virginius, on its way to effect a landing on Spanish soil in support of an insurrection. But when the interests involved in a right claimed but not acknowledged are subjected to physical damage, physically to oppose that damage is rather self-help than self-defence, and from the point of view of law cannot be tolerated. If in support of the claim all the resources of diplomacy, including arbitration and mediation where possible, have been exhausted, there may be sufficient ground for taking the matter up from the point of view of policy, and it is possible that it may even be submitted in good faith to the chances of war. So we may agree with the arbitrators in condemning the United States legislation, above referred to[1],

[1] See above, p. 167.

against killing furbearing animals in parts of Behring's sea which were not territorial waters, and the capture and condemnation of British ships in pursuance of that legislation, without necessarily denying that a claim for some protection of the seal herd in the high seas was reasonable, and in the due course of international procedure might have been ultimately maintained by physical means. The possibility that such protection of the seal herd might be necessary was recognised by Great Britain in the reference which was made to the arbitrators, to report such rules as they should deem to be proper for the purpose. But as soon as the United States failed, as they were bound to fail, in establishing a property in the seals found outside their territorial waters, it was apparent that the British ships which had been condemned had done no injury to a right but, at the utmost, damage to an interest, and that the violence done to their flag could not in law be justified.

Here we must notice something which Sir Charles Russell, afterwards Lord Russell of Killowen, said in the course of his very able argument, in answer to a suggestion made by the president of the court, M. de Courcel. The United States, he said, "would have a right to complain if it could be truly asserted that any class or set of men had, for the malicious purpose of injuring the lessees of the Pribilof Islands [belonging to the U.S.A.], and not in regard to their own profit and interest and in exercise of their own supposed rights, committed a series of acts injurious to the tenants of the Pribilof Islands. I agree that that would probably give a cause of action, and therefore they have the further right, what I might call the negative right, of being protected against malicious injury[1]." The reader needs but to think of the English cases on trade combinations in order to realise how slippery a ground of decision is furnished by malice, whether in respect of the difficulty of proving a motive, or in respect of allowing the motive, if proved, to give a right to a party who, if he had not been fortunate enough to have a malicious adversary, would only have had an interest. We may be sure that if it had been necessary to follow out a supposed state of fact so different

[1] *International Arbitrations of the United States*, by J. B. Moore, v. 1, p. 890.

from that which was before the court, the eminent advocate would have explained that, apart from physical interference with the property of the lessees or tenants, he meant only to speak of the aspect which malicious damage to an interest might assume in diplomacy, and not to admit that in law it could justify forcible interference with foreign shipping.

Another class of cases which presents the question whether self-defence is a justification for interfering with the foreign flag beyond the limits of territorial waters is that of the laws called hovering laws, by which many states—and England formerly among the number, though the British statutes of the kind have been repealed—for the prevention of smuggling or of illicit trade with colonies, prohibit vessels from transhipping goods or hovering within, most commonly, three or four leagues from their coast. Lord Stowell put such legislation on the ground that "maritime states have claimed a right of visitation and enquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare[1]." But the mutual tolerance of the system, largely due to sympathy, and not brought by definite international transactions to any precise test whether of the purposes or of the distance for or within which the tolerance extended, can hardly be thought a sufficient legal foundation for such a superstructure. Chief Justice Marshall in the United States put it on the ground of a state's "power to secure itself from injury," analogous to "the right of a belligerent to search a neutral vessel on the high seas for contraband of war," adding that the means for preventing "any attempt to violate the laws made to protect this right...do not appear to be limited within any certain marked boundaries which remain the same at all times and in all situations[2]." But even if the law of contraband could be considered as based on principle and not as a compromise between belligerents and neutrals, the analogy would break down in that belligerents have no right to restrict by way

[1] In *The Louis*, 2 Dodson 245.

[2] *Church v. Hubbart*, 2 Cranch, 234, 235.

of precaution the navigation of vessels not carrying contraband. And the learned judge seems to have changed his opinion, as he said a little later that "the seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas for the breach of a municipal regulation, is an act which the sovereign cannot authorise[1]." When we discuss on its merits the argument of self-defence as urged in favour of hovering laws, we must say that precaution, to which the case is reduced when those laws interfere with a ship not actually engaged in illicit trade, is not defence. "I will suggest," Sir Charles Russell said in the Behring's sea arbitration, "that the very idea of defensive regulation or defensive act, or self-preservative act, repels the idea of cut and dried, formulated rules[2]." If however the ship interfered with was really on her way to effect, or was engaged in facilitating for others, an illicit landing on the coast, it might be difficult to distinguish her case from that of the Virginius. Questioned by one of the arbitrators as to what the executive authority of a state would do if it had notice that a foreign ship was crossing the ocean for the purpose of violating its revenue laws, Sir Charles said that it "would probably do something before the vessel got within the three-mile limit, if it was proved to be necessary, relying upon the non-interference of the state to which that fraudulent vessel belonged not to make any complaint or raise any question whether the strict territorial limits had been exceeded[3]." He was attorney-general, and therefore, we may conjecture, did not speak without some knowledge of the practice. British acts of parliament require vessels liable to quarantine or having infectious diseases on board to observe certain regulations when within two leagues of the coast of the United Kingdom, but they authorise no enforcement of those regulations except by the recovery of a penalty from the captain when the vessel arrives within the territory.

[1] *Rose v. Himely*, 4 Cranch 241, 279. In *The Apollon*, 9 Wheaton 362, and in the case of *The Itata* before the United States and Chilean Claims Commission, Moore's *International Arbitrations of the United States*, v. 1, p. 3067, the seizure declared improper was made in a common highway on the voyage to a foreign state, or in the territorial waters of a foreign state, which cases are too clear for doubt.

[2] *United States Arbitrations*, v. 1, p. 893. [3] u.s., p. 903.

Pursuit from Territorial Waters to the Open Sea.

We have mentioned that the exclusive authority of the state of the flag in the open sea is subject to a perhaps doubtful exception for the case of pursuit lawfully commenced in territorial waters and continued without interruption in the open sea. This extension of the right of the territorial state was voted unanimously by the Institute of International Law in 1894, and was expressed to include the right of judgment in case of such capture for an offence committed within territorial limits, the capture however to be immediately notified to the state of the flag[1]. The doctrine has the sanction of, among others, Bluntschli[2] and Hall[3]; and it may be regarded as the counterpart of the doctrine, admitted by Lord Stowell following Bynkershoek, that a belligerent capture may be made in territorial waters on a part of the coast where no damage can be done, if the contest began or the summons to submit to search was made outside those waters, and there has been a hot continuous pursuit[4]. Indeed the case is stronger, for the right of pursuit is not necessary to war, but is necessary to the effective administration of justice and to the secure enjoyment of fishery rights in time of peace. And Sir Charles Russell, in his argument before the Behring's sea arbitrators, after quoting his official experience as attorney-general and assuming that that of the United States counsel was the same, stated that "there is a general consent on the part of nations to the action of a state pursuing a vessel under such circumstances [an offence against municipal law committed within territorial waters], out of its territorial waters and on to the high sea[5]." It is true that the eminent advocate went on to say that it "is not a strict right by international law, but something which nations will stand by and see done, and not interpose if they think that the particular person has been endeavouring to commit a fraud against the

[1] 13 *Annuaire,* p. 330.

[2] *Droit International Codifié,* § 342.

[3] § 30.

[4] *The Anna,* 5 C. Robinson, 373, 385 *d.*

[5] *International Arbitrations of the United States,* by J. B. Moore, vol. 1, p. 893.

laws of a friendly power." But here, as so often, we are only encountering the difficulties which have their origin in the mistaken refinement which has been attempted about the name of law. In our sense of that word there can be no such thing as international law, if it does not exist in a case in which a general consent to it on the part of nations is admitted[1].

In the arbitral award between the United States and Russia on the capture of the *James Hamilton Lewis* and *C. H. White*, sailing ships of the former nation, by the cruisers of the latter, it was declared that "the system of the party defendant, according to which the ships of war of a state are allowed to pursue even beyond the territorial sea a vessel of which the crew has committed an unlawful act in the territorial waters or on the territory of that state, cannot be recognised as conformable to the law of nations, because the jurisdiction of a state does not extend beyond the limits of the territorial sea unless an exception has been made to that rule by an express convention[2]." But the pursuit in those cases was commenced as well as carried on in the open sea. The Russian ships were cruising beyond their territorial waters, and we have the authority of the eminent arbitrator, M. Asser, for stating that he agrees with the doctrine of the Institute, and that the sentence quoted from his award must not be otherwise understood.

[1] While it is necessary to point this out when quoting words used in the course of oral argument, we should do injustice to so eminent a jurist as Lord Russell of Killowen if we did not add our confident belief that on consideration, and with his pen, he would have recognised that the rule in question was law. He said that the consent was by acquiescence, but that, when general, is as binding as consent in writing; at least an English common-law judge could scarcely say otherwise. He admitted to M. de Courcel that the consent by acquiescence was "not in every case"; but with a context which shows that he contemplated no other limitation of the cases than that which is contained in the conditions of the rule, as that "it must be a hot pursuit, it must be immediate, and it must be within limits of moderation."

[2] *Revue de D. I. et de L. C.*, 2me série, t. 5, pp. 83, 90.

Jurisdiction in the open Sea.

Jurisdiction and authority are often used as equivalent terms, but strictly jurisdiction is a branch of authority, namely the right to try, judge and enforce judgment. With regard to what takes place on the high seas, this includes punishing all offences committed on board a ship, and giving their due effect, as elements in the status of persons or in civil actions, to all marriages, births, deaths, contracts and other civil facts which take place on board her. That must be done on land, as the circumstances do not permit judicial procedure at sea, and no words are needed to prove that, for facts occurring in the open sea, punishment and the direct judgment on their civil effects must belong to the courts of the state to the exclusive authority of which the ship was subject when they occurred, and that those courts will apply to the different cases the same laws as if the facts had occurred in the territory subject to them on land. There is nothing to indicate a competitive claim on the part of any other courts or laws, and if the effect of a civil fact which has taken place on board has to be judged indirectly as an element in an action which for other reasons is brought in another court, as if the title to property situate in a country foreign to the nationality of the ship depends on the lawfulness of a marriage contracted on board, still the same law must be applied as if the fact in question had occurred on dry land belonging to the state of the ship. We shall see that as to what happens in territorial waters the state authority over the locality may have to be taken into account as well as that over the ship. But on the high seas the territorial character impressed on the ship by its flag is a fiction as accurate for purposes of jurisdiction as a fiction can ever be. It only fails in cases of collision, in which, where the colliding ships are of different territorial character, a difficulty might arise. But a solution is furnished by the admiralty jurisdiction *in rem*, which enables proceedings to be taken in any port in which either ship charged with offending is found.

It is an important enquiry whether, when on the ground of self-defence the officers of a state foreign to a ship's flag may justifiably assert an authority on board or over her, the exception

so allowed to the exclusive authority of the state of the flag extends to jurisdiction. It may be argued that since the exercise of jurisdiction is a deliberate proceeding on land, it cannot be brought under the necessity which may exist for preventing the completion of a wrongful act at sea, and that persons captured by virtue of that necessity can only be secured in order to their undergoing punishment, if such they deserve, under the ordinary conditions of trial. Thus the British government, in its correspondence with Spain on the case of the Virginius, argued that after the vessel had been seized and the passengers and crew detained "no pretence of imminent necessity of self-defence could be alleged, and it was the duty of the Spanish authorities to prosecute the offenders in proper form of law, and to have instituted regular proceedings on a definite charge before the execution of the prisoners"; and that had this been done it would have been found that "there was no charge either known to the law of nations or to any municipal law under which persons in the situation of the British crew of the Virginius could have been justifiably condemned to death[1]." It may be suggested that the premises would have warranted a larger conclusion, and that when the necessity for self-defence was at an end, the prisoners ought to have been surrendered to the United States, to be dealt with under the jurisdiction carried by the flag. We shall see however, when discussing jurisdiction generally, that states extend a wide toleration to the assumption by many of them of a jurisdiction to punish acts, in the nature of offences against such states, which have been done abroad by foreigners who afterwards enter their territory. Acts justifying intervention for self-defence would belong to that category, and it may therefore well be that, if the Virginius was justifiably brought into a Spanish port, the right to punish those on board her for the attempt to assist the insurgents accrued to Spain on a principle tacitly allowed to operate in parallel cases. Still the British government will have been right in maintaining that it was an international wrong to inflict punishment summarily, and that even after regular trial the penalty of death would have been excessive; and it justly obtained compensation for the families of the British subjects executed.

[1] *Parliamentary Papers*, 1874, lxxvi; Hall, § 82.

Piracy.

Piracy was thus defined by one of the greatest of the older authorities on the law of nations, Sir Leoline Jenkins, in his charge to the jury at an admiralty sessions in 1668:

"That which is called robbing upon the high way, the same being done upon the water is called piracy. Now robbery, as 'tis distinguished from thieving or larceny, implies not only the actual taking away of my goods while I am as we say in peace, but also the putting me in fear by taking them away by force and arms out of my hands or in my sight and presence; when this is done upon the sea, without a lawful commission of war or reprisals, it is downright piracy[1]."

And of the authority and jurisdiction over pirates, which was universally held to belong to any state that could catch them, Sir Leoline said:

"All pirates and sea-rovers...are in the eye of the law *hostes humani generis*, enemies not of one nation or of one sort of people only but of all mankind. They are outlawed, as I may say, by the laws of all nations, that is, out of the protection of all princes and of all laws whatsoever. Every body is commissioned and is to be armed against them, as against rebels and traitors, to subdue and to root them out[2]."

Thus Sir Leoline Jenkins defines piracy as robbing on the water, and he expressly says that it "cannot be committed anywhere else but upon the sea, within the jurisdiction of the admiralty[3]." But Bynkershoek defines pirates as persons who depredate by sea or land without authority from a sovereign[4], and in past times some of the greatest evils of piracy have consisted in descents on coasts with devastation of the country and carrying the wretched inhabitants into captivity. Probably however no real discrepancy is intended here. As Hall observes: "piracy cannot take place independently of the sea, under the conditions at least of modern civilisation, but a pirate does not so lose his piratical character by landing within state territory that piratical acts done on shore cease to be piratical[5]." By this we understand, and agree to the doctrine, that if the robber were afterwards caught at sea, what he had done on land would

[1] *Life of Sir L. J.*, v. 1, p. lxxxvi.
[2] *Ibid.*
[3] u.s.
[4] *Quæstiones Juris Publici*, l. 1, c. 17.
[5] § 81.

be evidence of his nefarious avocation, and the captor's state would have jurisdiction over him even though there might be no proof that his ship had been concerned in any act of violence on the water; while on the other hand we agree with Dr Lawrence that, if he were caught on land, his character as a pirate would be thrown into the shade and overridden by the fact that he was amenable to the territorial law for what he had done there[1]. Here we understand "land" strictly. If the pirate is captured in a port or creek, the captor's state will have jurisdiction[2].

The universality of the authority and jurisdiction over pirates and piratical ships, which anciently the captors exercised in a summary way by drowning or hanging from the yard arm, is not to be regarded as an exception to the exclusive authority and jurisdiction of the state of the flag, but as a consequence of the fact that piracy implies a rejection of all public rule, and of the general agreement of nations, testified by Jenkins, to meet that rejection by regarding pirates as outlawed and out of their protection. There is consequently no state flag in the case. If the piratical ship was ever entitled to carry one, her title to do so has been withdrawn. A recent writer, Dr Gareis, while admitting that any ship of war may capture a piratical vessel, has asserted that the right of punishing the pirates belongs only to the criminal jurisdiction of their country[3]. But he has not been followed, and Despagnet, one of the latest and best authorities, draws the old conclusion from the old grounds: *De là*, he says, *cette conséquence, admise de tout temps, que le pirate peut être saisi par les navires de n'importe quel état, et jugé par l'autorité compétente du pays qui a fait sa capture*[4]. The court in which the trial shall be held and the punishment to be inflicted will depend on the legislation of the captor's country, so too will the question whether the ship and the pirates' goods

[1] *Principles of International Law*, p. 210.

[2] *The Magellan Pirates*, 1 Spinks 81, in which case Dr Lushington said: "we all know that pirates are not perpetually at sea but under the necessity of going on shore at various places, and of course they must be followed and taken there or not at all"; p. 86. The attack on the Huascar (below, p. 182) took place in what Peru claimed as territorial water, and Calvo (§ 1153) considers this a fatal objection to it; but the British government refused to admit the claim of Peru.

[3] Holtzendorff's *Handbuch des Völkerrechts*, v. 2, pp. 573, 9.

[4] *Cours de Droit International Public*, § 440.

will go to the captors as prize or will be otherwise disposed of. But one maxim is universally accepted: *pirata non mutat dominium.* A piratical robbery does not divest the title of the person robbed, and on recapture the person robbed will be recognised as still the owner.

Are Unrecognised Insurgents Pirates?

Piracy, which once played so great a part in all seas, and especially in the Mediterranean and Caribbean, is now little heard of except in the Far East. But in other parts of the world the frequency of insurrections supported by naval forces, for the proceedings of which it was necessary to find some place in international law, has given a new prominence to the name. Those proceedings, so far as they are political and directed against the governments combated by the insurgents, are not of the nature of robbery and therefore do not fall under the ancient definition of piracy, though if an insurgent ship uses violence against third parties, her behaviour in doing so is not the less piratical because other parts of her activity are political. At the same time, so long as the insurgents whom she abets have not been recognised by the state called on to deal with her case as having belligerent rights, all parts of her activity have this in common with piracy, that they are without sanction from any authority recognised as competent to give it; and by fixing the mind on this circumstance, which in the case of piracy properly so called is the necessary consequence and adjunct of systematic robbery, as though it were the essence of the crime independent of an *animus furandi*, it became possible to bring even the political operations of insurgents under the head of piracy. During the insurrection of the Spanish American colonies one Thomas Smith, who from his name may be supposed to have been a United States citizen, with others, in a ship which they had seized by violence, plundered and robbed a Spanish vessel, and for so doing was convicted of piracy in the United States, the judgment of the Supreme Court (1820) being delivered by Story[1]. It may be inferred from the report that the act was one of war, done under a commission from an unrecognised insurgent

[1] *United States* v. *Smith*, 5 Wheaton 153.

government, but this is not noticed in Story's judgment. The point afterwards arose in the clearest manner in the case of *The Ambrose Light*, a ship which was the lawful property of unrecognised insurgents against the republic of Colombia, and of which none of the officers or crew were citizens of the United States. She was taken by a United States gunboat, carrying soldiers and arms, on her way to assist in the blockade and siege of the American Cartagena, which was holding out for the Colombian government; and she was condemned as prize though it is not alleged that she or those on board her had done any act of violence before her capture, but the political party with which she was acting had burnt the seaport town of Colon, occasioning great loss to United States citizens. The court said (1885) that "whether a foreign nation shall exercise its rights only when its own interests are immediately threatened, or under special provocation only after injuries inflicted by the insurgents, as in this case at Colon, is a question purely for the executive department. But when a seizure has been made by the navy department under the regulations, and the case is prosecuted before the court by the government itself, claiming *summum jus*—its extreme rights—the court is bound to apply to the case the strict technical rules of international law[1]." It follows that in the view of the court it is not in excess of extreme right that a ship's mere engaging in war on behalf of an unrecognised body should be so completely piracy as to give the authority to seize her, and the jurisdiction to condemn her, to a state not connected with her or with those on board her by property, nationality, political hostility or damage inflicted. But the ship was released on the ground that the United States government had recognised a state of war by implication.

The opposite view was maintained in 1877 by the government of Brazil. The Spanish steamer Montezuma was seized by Cuban insurgents, and sent by them under the new name of the Cespedes to attack Spanish merchantmen in the river Plate. The government of Spain requested that of Brazil to treat her as a pirate if she entered any of its ports; but the Baron de Cotejipe, the Brazilian minister of foreign affairs, refused this in a despatch in which he said:

[1] *The Ambrose Light*, 25 Federal 408, Scott's Cases 346.

"Les pirates, à proprement parler, sont ceux qui courent les mers pour leur propre compte, sans autorisation compétente, dans le but de s'emparer de force des navires qu'ils rencontrent, en commettant des déprédations contre toutes les nations indistinctement. Cette définition ne peut certainement s'appliquer à ceux qui ont pris le Montezuma. À cela s'opposent les arguments mêmes mis en avant par la légation de sa Majesté Catholique. Les hostilités qu'elle dénonce et prévoit ne sont pas dirigées contre toutes les nations, mais uniquement contre l'Espagne; elles n'ont pas pour but de commettre des déprédations, mais d'aider la cause d'une colonie en insurrection[1]."

The minister made at the same time the pregnant remark that "every government which is not interested in an insurrection is at liberty in certain circumstances to acknowledge the insurgents in the character of belligerents." It would indeed be unjust that the treatment of belligerents as pirates should depend on whether it suited the political convenience of a third-party state to recognise them as having belligerent rights. A public ship of a recognised state escapes the charge of piracy till either her government disclaims her or she has thrown off her allegiance to it, because recourse may be had to that government for the redress of the wrongs which she may commit. Similarly, if a ship has at her back a political body solid enough to be recognised as having belligerent rights whenever it suits third states to do so, a state which she offends can if it pleases make its just indignation felt by that body in case of need, and for the same reason as in the case of a state it is to that body that recourse should first be had. And since the position in which the recognition of belligerent rights would be proper is only to be attained by the performance of acts of war, it would even in the commencement of an insurrection be illogical, as Hall observes, to pretend that acts are piratical which are done for the purpose of setting up a legal state of things that can only be produced by the very acts in question[2]. If however an insurgent ship, not yet having at her back a political body solid enough to answer for her, should display the *animus furandi* against the subjects of a third-party state, there would be just cause for her being treated as a pirate against them.

Dr Lushington also adhered to the old definition of piracy,

[1] Calvo, § 1152.

[2] § 81.

and drew from it the same conclusions. "Piratical acts," he said, "are robbery and murder upon the high seas....I think it does not follow that, because persons who are rebels and insurgents may commit against the ruling power of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed towards other persons...especially if such acts were in no degree connected with the insurrection or rebellion[1]." And the British government has acted on the same principles. In 1873 the Spanish ships of war stationed at the European Cartagena fell into the hands of insurgents whom the government at Madrid thereupon proclaimed to be pirates, but the British, French and German governments instructed their naval commanders in the neighbourhood that they were not to be interfered with so long as the lives or property of subjects of the respective states, adding Italy in the case of the British instructions, were not threatened. If, in the course of any interference which might be needed, Spanish persons or ships were captured, they were to be delivered to the agents of the Madrid government, the only one in Spain which the powers recognised. In 1877 the Peruvian ironclad Huascar revolted as at least one of the first acts, if it was not indeed the only act, in an insurrection. She put to sea and took a supply of coal from a British ship without settling for payment, and took two Peruvian officials from another British ship. The British admiral on the station attacked her as a pirate, in which his government approved him, and refused the satisfaction which the Peruvian government, notwithstanding that it had declared that it would not be responsible for the acts of the Huascar, demanded.

If an insurgent ship continues to commit hostilities after the government on which she depends has to the knowledge of her commander ceased to exist, this will be piratical. The Confederate cruiser Shenandoah continued her depredations on United States vessels in the seas around Cape Horn for several months after the fall of the Confederate government, but as it was in ignorance the British authorities, on her arrival at Liverpool, allowed the captain and crew to go free and delivered the ship to the United States.

[1] *The Magellan Pirates,* 1 Spinks 81, 83.

CHAPTER IX.

TERRITORIAL WATERS.

Littoral Sea and Gulfs.

We have seen that the open sea is not within the sovereignty of any state because it is incapable of occupation. But neither the reason nor the conclusion applies to such part of the sea as is sufficiently near the land. That part may be of two descriptions. It may be a strip of a certain width extending along a coast and called littoral sea, or it may penetrate into the land as what is called a gulf. In either case it is capable of occupation by the sovereign of the land and therefore of becoming his territorial water. The means of occupation consist partly in the forts and batteries on shore, or in the shore itself considered as a platform from which guns not stationary can be fired, which are the means usually contemplated by writers on international law, and partly and not less really in the force which all maritime states maintain afloat. The analogy of the occupation of land shows that it is not necessary that every point of territorial water should at every moment be within the range of fire from a gun, even when we take guns afloat into account as well as those on shore. It is enough on *terra firma* that the sovereign's police should be adequate to render breach of his laws exceptional, and in general to punish it when it occurs. So much authority as that can be effectually provided in littoral seas and gulfs, and so far as it is possible to provide it the appropriation of those waters by the sovereign of the land is legitimate in principle. To complete the justification, however, there must be sufficient motive, nor is that far to seek. The sea

is a source of wealth from fishing, including that of pearls and amber obtainable from its bed, and this, within the narrow part bordering on the land, would be a scene of anarchy if left to the free competition of the world. Within the same part also the bed of the sea is a source of wealth from minerals, obtained by subterraneous and subaqueous working from the land, and the control over it is necessary for the defence of the coast and the prevention of smuggling. Indeed the motive is so strong that it has often led, in waters of which the occupation is impossible, to acts inadmissible there by strict law because implying sovereignty, as in the hovering laws of many countries[1]. For the establishment of sovereignty the motive and the occupation must be combined[2]. For that purpose, in order to avoid difficult questions as to the actual force available, occupation is presumed to a geographical extent presently to be considered. Within that extent the water and its bed are territorial, and the wealth of both is the property of the territorial sovereign. Outside it the enjoyment of the sea and its contents is free to all, and any necessary or desirable regulation must be obtained by international treaties, as has often been done in fishery matters, notably by the convention of 1839 between England and France as to the Channel, and by the North Sea convention of 1882 between Great Britain, France, Belgium, the Netherlands, Germany and Denmark.

The principle of a presumed limit to occupation was laid down by Bynkershoek, who, taking into account only force exercisable from the shore, taught, first, as a general maxim, *imperium terræ finiri ubi finitur armorum potestas*, and secondly, as the application of that maxim to his own time, the range of cannon, then considered to be three sea miles of sixty to a degree of latitude[3]. Hence that distance, measured from low water

[1] See above, p. 175.

[2] A state *ne peut s'approprier une chose commune telle que la mer qu'autant qu'il en a besoin pour quelque fin légitime, et d'un autre côté ce serait une prétention vaine et ridicule de s'attribuer un droit que l'on ne serait aucunement en état de faire valoir.* Vattel, l. 1, § 289.

[3] Bynkershoek's argument is in the dissertation *De Dominio Maris*, but the maxim, in the terse form quoted in the text, occurs in the *Quæstiones Juris Publici*, l. 1, c. 8.

mark, became a commonplace among authors for the width of the littoral sea, and we may say that the agreement on it as a minimum is universal: no state claims less. As a maximum the agreement is not universal, and it may be doubted whether it is so nearly such as to make it a rule of international law, while the increased range of cannon-shot, as well as the increased need of protection for shore fisheries against trawl nets and other destructive devices, has made the reason for it quite obsolete and inadequate. The width claimed by Spain is six miles, but that claim has been disputed by Great Britain and the United States[1]. Norway claims four, and the Institute of International Law in 1894 agreed *nemine contradicente* to recommend six miles as the width, after a division in which the proposal of ten miles, made by M. de Martens, was rejected by 25 votes against 10[2]. The nearest approach to an official understanding is to be found in Art. 4 of the Suez Canal convention of 1888, which prohibits hostilities within three sea miles from the ports at the extremities of the canal, but M. de Freycinet desired a limit better proportioned to the increased range of cannon, and the stipulation is not so expressed as to fix a maximum[3]. It may be considered that three miles is a width lying so far within both the possibility of occupation and the range of the motive that the presumption of occupation and consequent sovereignty to some larger extent could not be denied to any power which had consistently declined to be bound by so narrow a limit. Of course a power which had admitted the three-mile limit by international engagements could not extend it in its own favour without the consent of the parties to those engagements; and probably a power which without contract had admitted that limit by its internal legislation or by official statements could not extend it, to the detriment of neighbours whom it had allowed to fish up to it, at least until there had been some wide concurrence of states in

[1] Lord Seabury to Mr Watson, 25 Dec. 1874, and Mr Fish in United States Diplomatic Correspondence, 1875, p. 641; quoted by Boyd, 3rd English edition of *Wheaton's Elements*, p. 271.

[2] *Annuaire*, v. 13, p. 290. The rules adopted at this meeting with regard to the territorial sea are on pp. 328—331.

[3] See what is said below on certain fishery limits, p. 191, note 2.

support of such an extension as already commands the assent of thinkers.

The area of the land on which a strip of littoral sea is dependent is of no consequence in principle. Guns might be planted on a small island, and we presume that even in practice an island, without reference to its actual means of control over the neighbouring water, carries the sovereignty over the same width of the latter all round it as a piece of mainland belonging to the same state would carry[1]. But an extreme case may be put of something which can scarcely be called an island. "If," Sir Charles Russell said when arguing in the Behring sea arbitration, "a lighthouse is built upon a rock or upon piles driven into the bed of the sea, it becomes as far as that lighthouse is concerned part of the territory of the nation which has erected it, and, as part of the territory of the nation which has erected it, it has incident to it all the rights that belong to the protection of territory—no more and no less[2]." It is doubtful from the context whether the eminent advocate meant by this to claim more for the lighthouse in its territorial character than immunity from violation and injury, of course together with the exclusive authority and jurisdiction of its state. It would be difficult to admit that a mere rock and building, incapable of being so armed as really to control the neighbouring sea, could be made the source of a presumed occupation of it converting a large tract into territorial water. It might however be fair to claim an exclusive right of fishing so near the spot that, without the light, fishing there would have been too dangerous to be practicable[3].

The case of the pearl fishery is peculiar, the pearls being obtained from the sea bottom by divers, so that it has a physical connection with the stable element of the locality which is wanting to the pursuit of fish swimming in the water. When carried on under state protection, as that off the British island

[1] We have seen above, p. 120, that Lord Stowell held the neutrality of the United States to extend three miles outwards from the mud islands off the coast of the Mississippi.

[2] 1 Moore's *United States Arbitrations* 900.

[3] See what is said about the Seven Stones above, pp. 119, 120. That case is not exactly in point, being one of a lightship and not a lighthouse.

of Ceylon, or that in the Persian Gulf which is protected by British ships in pursuance of treaties with certain chiefs of the Arabian mainland, it may be regarded as an occupation of the bed of the sea. In that character the pearl fishery will be territorial even though the shallowness of the water may allow it to be practised beyond the limit which the state in question generally fixes for the littoral sea, as in the case of Ceylon it is practised beyond the three-miles limit generally recognised by Great Britain. *Qui doutera*, says Vattel, *que les pêcheries des perles de Bahrein et de Ceylan ne puissent légitimement tomber en propriété*[1]? And the territorial nature of the industry will carry with it, as being necessary for its protection, the territorial character of the sea at the spot.

As to bays, if the entrance to one of them is not more than twice the width of the littoral sea enjoyed by the country in question—that is, not more than six sea miles in the ordinary case, eight in that of Norway, and so forth—there is no access from the open sea to the bay except through the territorial water of that country, and the inner part of the bay will belong to that country no matter how widely it may expand. The line drawn from shore to shore at the part where, in approaching from the open sea, the width first contracts to that mentioned, will take the place of the line of low water, and the littoral sea belonging to the state will be measured outwards from that line to the distance, three miles or more, proper to the state[2]. But although this is the general rule, it often meets with an exception in the case of bays which penetrate deep into the land and are called gulfs. Many of these are recognised by immemorial usage as territorial sea of the states into which they

[1] L. 1, § 287. See also Sir C. Russell in the Behring sea arbitration, 1 Moore 901, and Chief Justice Cockburn in *Reg.* v. *Keyn*, L. R., 2 Exch. D., 199.

[2] The conventions above referred to (p. 188) relating to the English Channel and the North Sea recognise the exclusive right of fishery to a distance of three miles from low water mark, and in bays of which the opening from headland to headland does not exceed ten miles. There is thus an inconsistency between the two limits, no doubt justified by fishery conditions, but detracting from any authority which it might be thought attaches to the conventions in question as helping to determine the limit of the general territorial right either for bays or for a less indented coast line.

penetrate, notwithstanding that their entrance is wider than the general rule for bays would give as a limit to such appropriation. Examples are the Bay of Conception in Newfoundland, penetrating forty miles into the land and being fifteen miles in average breadth, which is wholly British[1], Chesapeake and Delaware Bays, which belong to the United States[2], and the Bay of Cancale, seventeen miles wide, which belongs to France. Similar exceptions to those admitted for gulfs were formerly claimed for many comparatively shallow bays of great width, for example those on the coast of England from Orfordness to the North Foreland and from Beachy Head to Dunnose, which, together with the whole of the Bristol Channel and various other stretches of sea bordering on the British Isles, were claimed under the name of the King's Chambers[3]. But it is only in the case of a true gulf that the possibility of occupation can be so real as to furnish a valid ground for the assumption of sovereignty, and even in that case the geographical features which may warrant the assumption are too incapable of exact definition to allow of the claim being brought to any other test than that of accepted usage. It is sometimes said and may be historically true that all sovereignty now enjoyed over the littoral sea or certain gulfs is the remnant of the vast claims which, as we have seen[4], were once made to sovereignty over the open sea, and which it is held have been gradually reduced to a tolerable measure through such intermediate stages as that of the King's Chambers; and the impossibility of putting the claim to gulfs in a definite general form may be thought favourable to that view. None the less however the rights which are now admitted stand on a basis clear and solid enough to distinguish and support them.

[1] *Direct United States Cable Company Limited* v. *Anglo-American Telegraph Company Limited*, L. R. 2 Ap. Ca. 394.

[2] Wharton's *Digest*, § 28; Taylor, § 229.

[3] An undefined extent of the upper part of the Bristol Channel is still claimed by Great Britain, and is fairly within the principle of gulfs: *Reg.* v. *Cunningham*, Bell's Crown Cases 86.

[4] See above, p. 165. The view referred to is that of Hall, § 40.

Limits and Nature of the Right in the Littoral Sea and Appropriated Gulfs.

We have described the right enjoyed by a state in its littoral sea and appropriated gulfs as sovereignty, in accordance with the conclusion to which our examination of the possibility of occupation as the foundation of the right led us. But since it is possible for passing foreigners to enjoy without resulting mischief greater freedom on territorial water than on territorial land, that freedom is established in their favour by rules which cannot be better expressed than in the following portion of the resolutions adopted in 1894 by the Institute of International Law.

Art. 5. All ships without distinction have the right of innocent passage (*passage inoffensif*) through the territorial sea, saving to belligerents the right of regulating such passage and of forbidding it to any ship for the purpose of defence, and saving to neutrals the right of regulating the passage of ships of war of all nationalities through the said sea.

Art. 6. Crimes and offences committed on board foreign ships passing through the territorial sea by persons on board of them, against persons or things on board the same ships, are as such outside the jurisdiction of the littoral state, unless they involve a violation of the rights or interests of the littoral state or of its subjects[1] not forming part of the crew or passengers.

Art. 7. Ships which pass through territorial waters must conform to the special regulations published by the littoral state in the interest and for the safety of the navigation or as matter of maritime police.

Art. 8. Ships of all nationalities are subject to the jurisdiction of the littoral state by the simple fact that they are in territorial waters, unless they are only passing through them.

The littoral state has the right to continue on the high seas a pursuit commenced in the territorial sea, and to arrest and judge the ship which has broken its laws within its waters[2]. In case however of capture on the high sea, the fact shall be notified without delay to the state of which the ship carries the flag. The pursuit must be interrupted as soon as the ship enters the territorial sea of its own country or of a third power. The

[1] *Ressortissants*, which includes persons, if any, over whom jurisdiction is claimed by reason of domicile as well as proper subjects or nationals. This article and the first paragraph of art. 8 will be further noticed in chapter XI.

[2] We have quoted this above, p. 177.

right to pursue is at an end as soon as the ship has entered a port of its own country or of a third power.

Art. 9. The peculiar situation of ships of war and the ships assimilated to them is reserved.

It is necessary here to guard against an erroneous inference which might be drawn from the doctrine expressed in the above art. 7. The right of the littoral state to publish regulations in the interest of the navigation does not include a right to exact payment of dues, by ships not entering its harbours, under pretext of providing the navigation with necessary lights and buoys. It has been well said by Dr Stoerk that

"The institutions provided by littoral states for the benefit of maritime traffic find their compensation, in part directly by harbour dues, light dues and so forth"—the context shows that the light dues here mentioned are only those exacted in harbours—"in part indirectly in securing and advancing the maritime traffic of their own nationals. Although lighting and buoying a coast is doubtless of great use even to navigation on the high sea, it gives by customary law no claim to the littoral state, not even when the passing ship has crossed the boundary of the littoral water. The development of this doctrine was owing both to the technical difficulties in the way of levying such tolls, and to the operation of reciprocity in distributing the burdens and the benefits of such institutions among all seafaring nations in a fairly equitable manner. The nation which performs its administrative duty as a state by erecting and maintaining these helps to maritime traffic secures to its own subjects, through the modern system of treaties of commerce and navigation, the advantages of the parallel administrative action of all other nations having intercourse with the world. Grotius adhered to the older practice, issuing from a fiscal point of view, when he wrote *quare nec contra jus naturæ aut gentium faciet qui, recepto in se onere tuendæ navigationis juvandæque per ignes nocturnos et brevium signa, vectigal æquum imposuerit navigantibus:* l. 2, c. 3, § 14. His commentator Cocceji, in the spirit of all the old school, agrees with him. But by the end of the eighteenth century levying such dues was already considered as permissible only in such narrow seas as from their dimensions can be regarded as littoral waters[1]."

Since the end of the eighteenth century a further progress has been made, and even littoral waters now present no exception to the rule that dues cannot be levied on passing ships without

[1] Holtzendorff's *Handbuch des Völkerrechts*, v. 2, p. 494. Stoerk quotes Cocceji as saying: *Princeps enim uti territorium cujus imperium occupavit securum præstare debet, ita et mare. At quia suis sumptibus id facere non tenetur, merito a transeuntibus ideo exigere aliquid potest.* On Grotius, l.c.

express sanction from treaty, as in the case of the light maintained on Cape Spartel under a treaty between all or most of the maritime states of the world. We shall meet with this principle again in the case of the Sound dues[1].

The circumstance that the right of the littoral state is limited by the right of innocent passage has led to the question whether, instead of speaking of sovereignty over territorial seas subject to the latter right as a servitude or easement, it would not be more suitable to say that the littoral sea and gulfs are not territorial, though subject to certain rights of the littoral state, which in their turn would thus assume something of the character of servitudes. The Institute of International Law decided by a large majority in favour of the existence of a territorial sea subject to sovereignty, and rightly as we think for several reasons. First, the occupation which is the ground of sovereignty is possible. Secondly, either way certain rights will have to be treated as exceptions to those implied in the terminology adopted, and these can be more simply stated if they consist in innocent passage than if we have to enumerate all the rights reserved to the littoral state. Thirdly, if on any occasion it should be questioned whether the enumeration of the rights to be treated as exceptions to those implied in the terminology is exhaustive, the predominant part in deciding on the new case will be given to the littoral state if it is regarded as sovereign, and this is as for its safety it should be. Fourthly, it would be impossible to doubt the territorial character of ordinary harbours, though not included within low water mark, and these shade insensibly into bays with openings twice the width of the littoral sea, which again, so far as concerns sovereignty, cannot be distinguished in principle from the littoral sea itself. In the case of the Franconia (*The Queen* v. *Keyn*) the judges were divided on the question whether the littoral sea is part of the territory of England, but there were other grounds for denying the court's jurisdiction, and the captain of a foreign ship, who had caused death by negligent navigation within the three-mile limit, was discharged[2]. Thereupon parliament, by the Territorial Waters Jurisdiction Act 1878, recited that "the

[1] See below, p. 198.

[2] L.R., 2 Exch. D., 63.

rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions, to such a distance as is necessary for the defence and security of such dominions," and proceeded to lay down rules of jurisdiction and procedure which we shall have to mention in treating of that subject. This language favours the view that the right is one of sovereignty, and abstains from fixing a maximum width for its zone.

It is necessary here to notice the view of so eminent an authority on international law as Hall, who asserts that "the right of innocent passage does not extend to vessels of war." He argues that "no general interests are necessarily or commonly involved in the possession by a state of a right to navigate the waters of other states with its ships of war. Such a privilege is to the advantage only of the individual state, it may often be injurious to third states, and it may sometimes be dangerous to the proprietors of the waters used[1]." But a ship of war as well as a merchantman may have a lawful errand beyond the littoral sea in question, the importance of which consideration we have seen in the case of international rivers[2]. In the course of its lawful voyage it may be difficult for it to avoid the littoral sea, especially if the width of the latter should receive any general extension. And the possession by the littoral sovereign of a right to interrupt the voyage would expose him, if neutral, to the most inconvenient demands from belligerents for his exercise of that right, while his own safety is sufficiently provided for by the authority to regulate which article 5 of the Institute reserves to him. It would be a very different matter for ships of war to take up even a temporary station in foreign, though friendly, territorial waters, and except under stress of weather they do not in fact do so without previously obtaining permission. Indeed even for vessels which are not ships of war the right of innocent passage does not include an unlimited right of anchoring or hovering. Fishermen may not in territorial waters even prepare to fish. If they might do so, an impossible strictness of surveillance would be necessary to prevent their fishing in them.

[1] § 42. [2] Above, p. 147.

Straits.

The straits which have to be considered in international law are those of which the width is not more than twice that of the littoral sea of the country, if only one, through which they lead, or not more than the aggregate width of the littoral seas of the two countries between which they lead, ordinarily therefore not more than six sea miles, so that no way through them can be had without passing through territorial water. The strait or each half of it is littoral sea of the respective littoral state, and there is a right of innocent passage through it dependent on the existence of a lawful destination beyond it for the sake of which such passage is desired[1]. If the strait connects two tracts of open sea, as the Gut of Canso between Cape Breton island and the mainland of Nova Scotia, or the Straits of Magellan and the other passages in the extreme south of America, the lawful ulterior destination is clear, and there is a right of transit both for ships of war and for merchantmen. If the strait leads through a single country into an inland sea lying entirely within the same country, as was formerly the case of the Bosphorus leading through Turkish land on both sides into the Black Sea, entirely surrounded by Turkish land until Russia gained a footing on its coast by the treaty of Kainardji in 1774, nothing is presented but an extreme instance of a bay the entrance to which is less than twice the width of the littoral sea. The rule that the inner part of such a bay, no matter how widely extended, belongs to the country in which it lies must be applied. It will be within the right of that country to exclude foreign navigation from its internal waters, and consequently from the strait which leads to them; and in fact, at the time mentioned, the Black Sea was a closed sea of the Turkish empire, and navigation through the Bosphorus was forbidden to foreign ships of war and merchantmen equally.

If the coast of the inland sea to which the strait leads is divided between two or more states, as has been the case with the Black Sea since 1774 and has always been the case with the Baltic, each of those states, whether bordering on the strait or

[1] See above, pp. 147, 196.

not, has in principle the right to admit ships from the open sea, whether military or mercantile, to its ports, and to seek egress to the open sea for its own military or mercantile flag, while outside states have in principle the right of access from the open to the inland sea for purposes of war. Here there is a lawful ulterior destination in each direction, carrying the right of innocent passage through the strait, whether its opposite shores belong to a single state, as those of the Dardanelles and Bosphorus to Turkey, and those of the Great and Little Belts to Denmark, or to different states, as those of the Sound to Denmark and Sweden since 1658, previous to which date both shores of the Sound also belonged to Denmark. As regards the mercantile flag the matter stands actually in practice as the principle requires, although in the case of the Baltic the full application of the principle was restricted till 1857 by the Sound dues, originally exacted by Denmark as sovereign of the passages, and as rendering services to navigation in connection with them. These were respected as immemorial, and their amount was regulated by numerous treaties, till they were redeemed for pecuniary indemnities by conventions concluded in 1857, one with the principal maritime states of Europe and the other with the United States of America. On this occasion the future freedom of ships not entering Danish harbours from exactions for lighting and buoying was secured by the promise of Denmark "not to subject any ship, on any pretext, to any detention or hindrance in the passage of the Sound or the Belts." As regards the military flag in the great European straits political considerations have intervened.

Notwithstanding the acquisition of certain Black Sea coast by Russia, and at later dates by Rumania and the vassal principality of Bulgaria, the straits of Constantinople have remained closed in general to ships of war other than Turkish, not as a matter of legal principle but by the free determination of the powers to continue to that extent the ancient state of things. Thus in the treaty of 1809 between Great Britain and Turkey, commonly called the treaty of the Dardanelles, it is said that "as ships of war have at all times been prohibited from entering the Canal of Constantinople, namely in the Straits of the Dardanelles and of the Black Sea, and as this ancient regulation

of the Ottoman empire is in future to be observed by every power in time of peace, the court of Great Britain promises on its part to conform to this principle." And in the preambles of the conventions of 1841 and 1856 the Christian powers "record in common their unanimous determination to conform to the ancient rule of the Ottoman empire, according to which the Straits of the Dardanelles and of the Bosphorus are closed to foreign ships of war so long as the Porte is at peace." Then follow the operative articles, the Sultan declaring his resolution in that sense and the Christian powers engaging to respect it. The convention of 1856 was "maintained" by Art. 2 of the treaty of London of 1871, adding a "power to his Imperial Majesty the Sultan to open the said straits in time of peace to the vessels of war of friendly and allied powers, in case the Sublime Porte should judge it necessary in order to secure the execution of the stipulations of the treaty of Paris of 30th March 1856." Afterwards, in 1878, Lord Salisbury inserted the following declaration in the 18th protocol of the congress of Berlin:

"Considering that the treaty of Berlin will modify an important part of the arrangements sanctioned by the treaty of Paris of 1856, and that the interpretation of Art. 2 of the treaty of London, which is dependent on the treaty of Paris, may thus become a matter of dispute, I declare on behalf of England that the obligations of Her Britannic Majesty relating to the closing of the straits do not go further than an engagement with the Sultan to respect in this matter His Majesty's independent determinations in conformity with the spirit of existing treaties."

Count Schouvaloff then inserted the following counter-declaration:

"The plenipotentiaries of Russia, without being able exactly to appreciate the meaning of the proposition of the second plenipotentiary of Great Britain respecting the closing of the straits, restrict themselves to demanding on their part the insertion in the protocol of the following observation—that in their opinion the principle of the closing of the straits is a European principle, and that the stipulations concluded in this respect in 1841, 1856 and 1871, confirmed at present by the treaty of Berlin, are binding on the part of all the powers in accordance with the spirit and letter of existing treaties, not only as regards the Sultan but also as regards all the powers signatory to those transactions."

Referring to his above declaration Lord Salisbury said in the House of Lords on 7th May 1885:

"The object of the declaration which I had to make on behalf of Her Majesty's Government I understood to be to establish the principle that our engagements in respect of the Dardanelles were not engagements of a general European or international character, but were engagements towards the Sultan only; the practical bearing of that reservation being that if in any circumstances the Sultan should not be acting independently but under pressure from some other power, there would be no international obligation on our part to abstain from passing through the Dardanelles."

The distinction between engagements towards the Sultan only and those of a general European character seems to have been rather infelicitously chosen as a ground for Lord Salisbury's practical conclusion, for he had himself said at Berlin, with reference to the confirmation of the treaty of 1871, that, if Batoum had not been declared a free and commercial port, England would not have been able to engage herself *towards the other European powers* to interdict herself from entering the Black Sea[1]. But in substance Lord Salisbury was in our opinion right, for an engagement depending on the Sultan's judgment of what should be necessary in order to secure the due performance of the treaty of Paris, towards whatever power such engagement exists, must surely refer to the Sultan's independent judgment, and not to that which he might be made to express by pressure from some other power.

The political history of the Baltic is that of the rise, progress and final defeat of an idea never proclaimed with regard to the Black Sea, namely that the states surrounding it could by their agreement convert the Baltic into a closed sea of their own, in which outside powers should not be allowed to carry on any operations of war. The effect of this, if realised, would be to unite all the Baltic states in a league of semi-alliance or at least of mutually benevolent neutrality; first, if any of them should be at war with an outside power, shielding its coast and commerce in the Baltic from attack or blockade, and allowing it to receive contraband of war by way of that sea, while also permitting it to use the Baltic as a place of arms, and the Sound

[1] This point is made by Geffcken, in 17 *Revue de D. I. et de L. C.*, p. 366.

as a sally port, for naval operations in the open sea; secondly, in case of a war anywhere, allowing neutral Baltic states to carry on a trade in contraband without interference till the vessels engaged in it reached the open sea. The idea comes to light in the treaty of Roeskilde between Sweden and Denmark, 1658, in which they agree not to allow foreign ships of war to enter the Baltic by the Sound or the Belts[1]. But it attained its full development only by the convention of 1st August 1780 between Sweden and Russia, to which Denmark acceded the same year and Prussia in 1781. The parties to this convention, which was one of those constituting the First Armed Neutrality, after reciting that all the powers surrounding the Baltic were in the enjoyment of the most profound peace, agreed "to maintain perpetually that it is a closed sea, and must be regarded as such by its local position, in which all nations may navigate in peace and enjoy the advantages of perfect tranquillity; in consequence they will take all measures to guarantee that sea and its coasts against all hostilities, piracy and violence." England however, France and Holland, the principal parties on both sides to the war then raging, declined to accept the neutrality of the Baltic except for that war. And when in 1807 the czar complained of the bombardment of Copenhagen because he was one of the guarantors of the tranquillity of the Baltic, the British answer denied that England had ever acquiesced in the principles on which it had been attempted to establish the inviolability of that sea. No one suggested that Denmark or Sweden had committed a breach of neutrality during the Crimean war by allowing, without protest, the passage of the Sound by British and French ships of war hostile to Russia; and the idea of closing the Baltic may be said to have been finally set at rest by the engagement of Denmark in 1857, quoted above[2], which applies without any distinction of military or mercantile flags[3].

[1] The treaty of 1759 between Sweden and Russia, to which Denmark acceded in 1760, is sometimes quoted as a further step in the promotion of the idea, but it seems to have related only to the war then raging.

[2] p. 198.

[3] Heffter thought that the closing or neutrality of the Baltic, attempted by the Armed Neutralities, was not "a blamable incongruity," but his posthumous editor Geffcken disagreed with him: § 76. See also Geffcken's article in 17 *Revue de D. I. et de L. C.*, p. 362.

Notes to Chapters VIII and IX.

Page 164. By saying that the Roman lawyers laid down that the sea was "public," it is not meant that in Roman law the sea was state property, but that it was one of the *res communes omnium*, not the subject of property at all. The stand made on this ground against the appropriation of parts of the sea may be traced as far back as a letter which Pope Alexander III—Roland Bandinelli, who had taught canon law at Bologna—addressed to Genoa on behalf of Count Guillem VII of Montpelier, 11 October 1169. *Non decet*, he says, *vos hujusmodi proprietates in mari requirere, quas paganos etiam non legimus requisisse.*

Page 179. In *Anderson's Case* (1 Wharton's Digest, § 33*a*), the British government admitted that a crime, committed by a British sailor on board a United States merchantman on the high sea, belonged to the exclusive cognisance of the United States.—The great American lakes present a singular case. By the treaty of 1783 the boundary between the United States and British North America was drawn "through the middle" of Lakes Ontario, Erie and Huron, and "through Lake Superior northward of the Isles Royale and Phelipeaux," so that the whole of those lakes is territorial water of one or the other state. But the admiralty jurisdiction of each is held to extend to the whole width of the lakes and connecting rivers, treating them as if they were open sea and straits, so that offences committed anywhere on those waters on board vessels of either country are triable in that country when the vessel and parties are brought within its geographical jurisdiction. *United States* v. *Rodgers*, 150 U. S. 249. This rule is demanded by a convenience amounting to necessity.

Pages 190, 191. The doctrine that pearl fisheries may be regarded as an occupation of the bed of the sea, and in that character are territorial, is discussed by Professor Oppenheim in an article on "the Channel Tunnel and International Law," in Kohler's *Zeitschript für Völkerrecht und Bundesstaatsrecht*, 1907, pp. 6–10. His conclusion is that the Ceylon and Bahrein pearl fisheries belong to Great Britain by virtue of unquestioned recognition, but that such recognition is merely a tradition from the times when the freedom of the open sea had not been established. He rejects the acquisition by occupation of any part of the open sea—does not the word "open" beg the question?—and thinks it plain that Vattel did not know that the fisheries in question were beyond usual territorial limits, since he only mentions them as an example under the heading *la mer près des côtes peut être soumise à la propriété:* l. 1, § 287.

We cannot agree in imputing to Vattel a want of the common knowledge about the subjects which he mentions. Limits are not dealt with by him in § 287, and, when he comes to them in § 289, we understand him as allowing the extent of appropriation necessary for the enjoyment of the rights which he has previously admitted. On the legal argument we submit that occupation is a question of fact, and that the case of common fishing boats, which can succeed one another without offensive mutual obstruction in the use of their lines and nets at the same point of the waters, is different from that of a fishery carried on systematically at a certain point and systematically protected there, that point too being identifiable in the stable bed of the sea. Surely the latter case may amount to occupation, and, when it does so, the legal consequences of occupation must follow.

Page 192. In *Mortimer* v. *Peters*, 14 Scots' Law Times 227, it was considered that the Moray Firth inside a line from Duncansby Head to Rattray Point *might be* territorial water, but the decision was based on the Herring Fishery (Scotland) Act 1889. That act however might be taken as proving that parliament held an international right to exist, as to the extent of sea for which it legislated.

Page 197. Are the Kara Straits, which connect the Arctic Ocean north of Europe with the same ocean north of

Asia, and are liable to be blocked by ice even in summer, to be considered as passages physically open? And if they are such, can Russia maintain such a claim to the part of the ocean bordering Siberia as to entitle her to close those straits as leading only into territorial water? In any case the Norwegian government was correct in asking Russian permission for a scientific and industrial mission to pass through the Kara Strait, for such a mission would certainly have to take some kind of action in territorial waters, and no kind of action in such waters by a foreign government or its agents is allowable without permission. See Waultrin, in 15 *Revue Générale de Droit International Public* 409—412.

Page 201. The Swedish minister of foreign affairs, Baron de Trolle, declared to the *Stockholms Tidning* that the treaty of 1857 does not relate to ships of war, being restricted by its context to merchant vessels, but that "the contention that the Baltic is *mare liberum* and the Sound a free strait for ships of war can be based much better on the general principles of international law, which date back much further than 1857." Reuter's agency at Stockholm, 20 March 1907, in the *Times* of 21 March 1907.

CHAPTER X.

NATIONALITY AND ALIENAGE.

Nationals and Aliens.

We must now recur to the datum of experience that a state is an ideal body, having a certain territory and composed of certain persons as its members or nationals, all others being foreigners or aliens[1]. We have considered the territory of the state, land or water: its international sovereignty in relation thereto may be summed up in the exclusive right to use force within it. We have now to consider the more complicated relation of the state to individuals; what are the conditions entitling a person to its nationality, that is to the character of a national, and how the distinction between nationals and aliens operates in practice.

The character of member or national of a given state depends on parentage or place of birth according to rules which we shall consider, but subject to those rules it is not limited for international purposes by the fact that for internal purposes distinctions may be drawn between different classes of the population, none of which have any tie to any other state. Thus the name and rights of citizen are refused by the French to certain subject populations in Africa, and by the United States to the Red Indians and Filippinos, permanent inhabitants of their respective territories. And in a monarchy, although the name "subject" does not admit of being refused like that of "citizen" in a republic, different portions of the permanent population may live under different laws, as in British India the Hindoos, the

[1] See above, pp. 3, 84.

Mahometans and the whites. Since such differences give no footing for the exercise of any foreign authority within the territory, the classes characterised by them must be embraced, as against other states, by the state which assumes the exclusive authority over them: they are not aliens but its nationals.

The tie between a state and its nationals is permanent, not in the sense that it cannot be severed, but in the sense that so long as it continues it exists whether the national is for the moment in the territory of his state or abroad. In the regular course of affairs a state protects its nationals in foreign countries: to examine applications for such protection, and to make the representations which they seem to merit to the territorial government or to the local authorities, is one of the principal duties of diplomatic or consular representatives. But protection outside its boundaries is granted by a state to aliens only in exceptional cases.

One of those exceptions occurs in states of other than European civilisation[1]. "By the laws of Turkey and other Eastern nations," Mr Marcy wrote, "the consulates therein may receive under their protection strangers and sojourners whose religion and social manners do not assimilate with the religion and manners of those countries. The persons thus received become thereby invested with the nationality of the protecting consulate. These consulates and other European establishments in the East are in the constant habit of opening their doors for the reception of such inmates"—this term is ill chosen, as they do not necessarily reside in the consulate—"who are received irrespective of the country of their birth or allegiance. It is not uncommon for them"—the consulates—"to have a very large number of such *protégés*. International law recognises and sanctions the rights acquired by this connection[2]." But the protection thus granted is not that full adoption by a state which is called naturalisation: those who receive it retain their true nationality for all purposes outside the Eastern state in question. A remarkable example of the practice is offered by the protection which France extends to Roman Catholic establishments in the East, irrespective of the true nationality of the persons who may belong to them.

[1] See above, p. 40.

[2] 2 Wharton's *Digest*, § 198.

The existence of the practice is easily understood, for the Eastern state does not perceive of what importance it may be to it to what Western group an individual may choose to attach himself who in any case would be unsuited to its own legal system. But it is an objectionable practice for several reasons. It enables a Western state, by gathering under its flag recruits who have little connection with it, to acquire an influence in the country out of proportion to its trade and to the number of residents really belonging to it; and it impedes the progress of the Eastern state by making it easy for its proper subjects to withdraw themselves from its control.

Another exception, made by the United States, was thus described by Mr Bayard, secretary of state, in a despatch of 5 August 1885. "The criterion...with respect to aliens, who have declared but not lawfully perfected their intention to become citizens of the United States, is very simple. When the party after such declaration evidences his intent to perfect the process of naturalisation by continued residence in the United States as required by law, this government holds that it has a right to remonstrate against any act of the government of original allegiance whereby the perfection of his American citizenship may be prevented by force, and original jurisdiction over the individual reasserted[1]." A memorable and perhaps the first case in which the States extended their protection to such a person, though strictly still an alien, was that of Koszta, a refugee of Austro-Hungarian nationality who had been concerned on the Hungarian side in the war of 1848, qualified by Austria as an insurrection. After he had formally declared his intention to become a citizen of the United States in pursuance of the statute in that behalf, and resided there for nearly two years, he was seized at Smyrna in Turkey by Austrian authorities claiming the right to do so under the capitulations, as the treaties regulating the condition of foreigners in the Ottoman empire are called, between that empire and Austria, and taken on board an Austrian ship of war with the avowed design of carrying him to Austria for punishment. The prompt intervention of a United States ship of war obtained, by threats equivalent to

[1] u. s., § 175.

force, his transfer to the custody of the French consul-general at Smyrna, from which he was released and sent back to the United States, the Austrian government, while agreeing to that course, reserving its right to proceed against him if he returned to Turkey. Koszta had invoked the protection of the United States consul at Smyrna, for which he could assert a claim as well under his incipient relation to that country as under the practice described in the last paragraph; and if the Turkish government was unable or unwilling to prevent the controversy between the two Western powers as to jurisdiction from being decided by force on the Austrian side, it could not object to the counter employment of force on the side of the States. As between Austria and the States, independent of the Eastern practice referred to, Mr Marcy, the secretary of state of the latter, laid down an untenable doctrine. "Foreigners," he wrote on 26 Sep. 1853, "may and often do acquire a domicile in a country, even though they have entered it with the avowed intention not to become naturalised citizens but to return to their native land at some remote and uncertain period; and whenever they acquire a domicile"—as Koszta certainly had done in America—"international law at once impresses upon them the national character of the country of that domicile[1]." The distinction between nationality and domicile, which we shall see in treating of the latter, cannot be thus set aside. But the proceeding in Koszta's case may be defended on the narrower ground afterwards taken in the above quoted despatch of Mr Bayard, on which he was able to distinguish it and the case of Burnato, "who had definitely abandoned Mexican domicile [but] was held for military service in Mexico on the occasion of a transient return," from that of Walsh, who "immediately after his declaration of intention established a commercial domicile in Mexico under circumstances which would have sufficed to disrupt his continued residence in the United States, and prevent his naturalisation under the statute." It would be difficult to deny that the protection of aliens in such cases as those of Koszta and Burnato may be justified as international intervention, but, if it is desired to bring it under general rules, Mr Bayard's

[1] u. s., § 193.

formulation of the necessary exception, though excellent as a guide for the practice of his country, depends too much on the terms of the United States laws on naturalisation to be serviceable as a general statement of international law. As such a statement we are inclined merely to say that an alien may have established such a relation between himself and a given country that the latter may be justified in intervening on his behalf when he is out of it[1].

In connection with the subject of protection afforded abroad, a question arises which is thus put by Hall. "Are the natives of a [colonial] protectorate to be regarded as simple foreigners when in other countries than their own, or can they demand to be placed in the same situation as is accorded to persons whom for one reason or another Great Britain has been in the habit of protecting? Up to the present time," he adds, "they seem to have been relegated to the former category, consistently no doubt with the opinion which has usually been held in England as to the powers acquired by establishing [such] a protectorate[2]." As we have agreed with Hall in arguing for the generality of the authority and jurisdiction enjoyed in a colonial protectorate[3], so we agree with him that "it becomes logically necessary" that its natives shall "share the right to diplomatic protection when occasion for it arises," and that, "if this view be not adopted, the practical inconvenience will make itself felt that natives of foreign [colonial] protectorates will have to receive more favourable treatment in British protected territories than can be conversely demanded." In other words the shadowy distinction between annexation and the acquisition of a colonial protectorate

[1] In Lawrence's *Wheaton*, p. 929, there is quoted a despatch of Secretary Marcy, of 10 January, 1854, refusing protection to Tousig, domiciled but not naturalised in the United States, and distinguishing his case from that of Koszta on the ground that he "voluntarily returned to Austria and placed himself within the reach of her municipal laws." It does not appear whether his return was intended to be transient, like Burnato's, but it appears that the protection was desired against penalties which it was alleged that he had incurred before his emigration, and the right to protect persons in his situation "from arbitrary acts of oppression or deprivation of property" is reserved.

[2] *Foreign Powers and Jurisdiction of the British Crown*, § 100.

[3] Above, pp. 127–9.

will not warrant the natives of the latter being treated, for the purpose of protection abroad, otherwise than as nationals. A protected state has its own nationals, and their protection outside its territory will depend on the terms existing between it and the state on which it is dependent. Those terms, by allowing to it diplomatic intercourse although under the control of the superior, may leave it capable of making for itself the necessary representations, or, by vesting the conduct of all its foreign relations in the superior, may require the latter to step forward on its behalf and that of its nationals[1].

Domicile.

The classification of a population as composed of nationals and aliens is not the only one that can be made with some bearing on international law. Another classification is that into residents and others, and this again may be varied according to the degree of fixity or permanence which a residence must present in order that it may be treated as such for a given purpose of law or administration. A very transient residence will suffice in order that the banns for a person's marriage may be published with full effect. A closer connection with a place may be required in order that the summons of a court of justice may be properly served at a person's dwelling when he is himself inaccessible. And so there may be an ascending scale of fixity of residence until we reach that which can be reasonably accepted as determining personal law and status in private matters, that is, as determining the territory with the society and habits of which a person is most closely identified, and the law of which ought therefore to govern, for example, the age of his majority and his power to dispose of his property by will. Residence of this last degree of fixity, when defined with the care necessary for a technical term, is called domicile. Thus there arises a classification cutting across that of nationals and aliens, there being in every country many aliens the character of whose residence stamps them as domiciled in it, while these, if they happen to be for a transient purpose in the country of

[1] See above, p. 22.

their nationality, will not be domiciled in it although its nationals. We said that the residence which is domicile can be reasonably accepted as determining the law of capacity and status, and in most European countries domicile has been actually used, at some period or other of their legal history, as the criterion in those matters, though often with exceptions preventing the capacity or status conferred by a foreign law from affecting the title to real or immovable property. But on the continent of Europe nationality has by many legislations been substituted for domicile for that purpose, the example having been set by France in the Code Napoleon, and followed by the Italian and German codes[1]. In England and the United States on the contrary nationality has not been introduced as a criterion for the law applicable in private matters, and in England the importance of the law of a person's domicile has even been increased by its adoption, with exceptions as to real property, for cases which our older practice referred to other laws, as for example that of the place of contract. Indeed in the British empire and the United States nationality would not furnish a complete criterion, because there are different systems of private law or of administration in the three parts of the United Kingdom and in its various colonies and dependencies, and so also there are in the various so-called states which compose the Union. Domicile therefore is the only possible criterion of a person's being an Englishman or a Scotchman, a Marylander or a Louisianian. If it was agreed that his nationality should prevent a British subject or a United States citizen from falling under the private law of Germany or Italy in consequence of his being domiciled there, recourse to the domicile of his ancestors or to his own original domicile would still be necessary as an ancillary criterion, for determining under which of all British or United States systems of private law he should fall. Of course what has been said of the British empire and the United States will equally apply to any state of

[1] We can here speak only in very broad terms of a matter so little connected with public international law, and we must therefore refer the reader to the different legislations for the limitations with which the general principle has been guarded, in favour of persons contracting with foreigners in *bona fide* ignorance of their want of capacity.

international law which comprises territories possessing different systems of private law or of administration.

Thus viewing domicile in its actual relation to personal law in private matters, one is led to ask how it can ever have been thought to govern the political relation of nationality, as we have seen Secretary Marcy asserting that it does. The answer must be found in history. In the middle ages, through the feudal system and the privileges acquired by the cities, the greatest political aggregates on the continent, as the Holy Roman Empire of the Germans and the kingdom of France, were split up into provinces and municipalities which occupied a larger space in the daily life and thoughts of their inhabitants than did the aggregates to which they belonged. The modern state did not exist, and powers which exclusively belong to it, as those of peace and war, were exercised by the lords and the cities as well as by the sovereigns to whom in the last resort they owed allegiance. To express the ideas, then floating and rudimentary, from the fixing and development of which the state has grown, the only available terminology was that of empire or kingdom on the one hand and nation on the other hand, and the name of nation was constantly applied to the people of a province. At the same time the smaller units had their customs and statutes relating to private law and their separate jurisdictions, and domicile, which in the Roman empire had been the leading test for holding that a defendant was amenable to the court of a given judge, was still handed down for that purpose. Thus nationality and domicile came to be often treated as equivalent terms, but as the state grew, the question of its membership became disentangled from private law, to rest first on the place of birth, which under feudal principles had been the leading test of allegiance, and later, as Roman principles of jurisprudence became more influential, on parentage.

In one department, however, of international law domicile has continued to be important, namely that which relates to the capture of private property at sea by a belligerent. The British and United States rule as to this still is that property is regarded as enemy or neutral according to the territory in which the merchant or the house of business owning it is established, although in France the question of enemy or neutral

is decided by national character. The Anglo-American view is defended on the ground that industry and commerce add to the strength of the country in which they are carried on, but it can scarcely be doubted that it is in some degree referable to the fact that in England the admiralty judges have usually been also the judges in probate and matrimonial matters, accustomed in the latter capacity to apply domicile as a criterion, and to rely on old jurists in whose language domicile and nationality were confounded. Of course the present judges, both in England and in the United States, are free from any such confusion of ideas, but they hold themselves bound to follow the established practice of their countries; and Secretary Marcy, in his turn, must have been influenced by what he found in the reported admiralty cases. For the rest, it must be remarked here, though the place for developing the remark will be found in discussing the laws of war, that the trade domicile which the Anglo-American practice upholds as the test for belligerent capture has come to differ more or less from the domicile which is now maintained in England as the criterion of personal status. The fixity of residence necessary for the latter has been wrought up to a higher degree by the decisions of the English courts during the last half century, during which there has been little opportunity for a British prize court to review the doctrine of trade domicile in war; and since the utility to a country of the industry and commerce carried on in it, which is the practical ground for that doctrine, depends more on the actual seat of an occupation than on its probable fixity, we may expect that a British prize court, when the opportunity shall again be given, will not follow the new tendency as to domicile in peace.

Control over Nationals abroad.

Since the tie between a state and its nationals is a personal one, it is not broken by geographical distance. If any of the nationals transport themselves to a region of the earth not yet annexed by any state of international law, whether they do so for the purpose of commerce or as settlers, their state may follow them with its authority and annex the region or establish a colonial protectorate over it. Their acquisitions are their own

as to property, but not, at least at first, as to sovereignty. If they set up a state and aspire to independence, their home state can treat their proceeding as illicit and substitute its own authority for that of the new organisation, unless it has left them to struggle unaided against the dangers and difficulties of the situation until they have consolidated a power sufficient for the maintenance of civilised life and order. In that case, since the duty of allegiance and the right to protection are correlative, the right to allegiance would be lost by the omission to give protection. The claim to the continuance of sovereignty under a national law would be met by a claim to recognition and independence under the principle of justice as a branch of the moral law, and the controversy would have to be judged in conscience by the parties to it. We have spoken of recognition of insurgents as a new state, as a question between the old government and third states[1]. As a question between the old government and its subjects, whether emigrants or insurgents on old soil, it is not one of international law. These principles have been largely illustrated in Africa. A great part of the colonisation of that continent, especially by Great Britain and Germany, has taken place by the extension of state authority over regions in which settlers of the respective European nationalities had previously established themselves. An extreme instance of the right was given when Great Britain followed in arms the Boers who had trekked inland across the frontier of the Cape Colony. She ultimately recognised their independence, for the Transvaal by the Sand River convention in 1852 and for the Orange Free State by the convention of Bloemfontein in 1854; whether soon enough for justice must be a matter of opinion, in which the danger to the colony from any excitement of the natives outside it must be taken into account.

When the nationals of one state are in the territory of another, whether resident there or for a transient purpose, the authority of the former over them can still be exercised, not by action on the foreign soil, for any such action would be a usurpation of the territorial sovereignty over that soil, but by enacting penalties to be enforced on the return of the culprits to

[1] Above, p. 57.

its own territory, or fines to be levied from the property which they may have there. For states in which military service is compulsory, one of the most obvious applications of this is to securing the return of absentees in order to their performing such service. Another application is to the punishment of crime committed abroad. Thus "Russia, many of the German states, Italy, Austria, some of the Swiss cantons and Norway enforce their domestic criminal law against all of their subjects who have committed offences abroad either against the state itself, their fellow subjects, or foreign subjects[1]." Great Britain punishes its subjects who commit abroad treason, misprision or concealment of treason, murder, manslaughter, bigamy, offences against the acts prohibiting the slave trade or the Foreign Enlistment Act, and perhaps one or two others of smaller importance. Also offences against property or person committed at any place, ashore or afloat, out of the king's dominions, by any master, seaman or apprentice, who at the time when the offence was committed or within three months previously has been employed in any British ship, subject the offender to trial and punishment in England—an enactment which comprises offences committed outside the limits of British authority, whether on land or on shipboard, not only by subjects but by foreigners deriving a tinge of British character from recent employment on a British ship[2].

Admission of Aliens to the Territory.

Between states of the white race, the entire exclusion of the subjects of any from the territory of any other at peace with the former has scarcely been attempted within historical times. If such an attempt could be imagined, it would be defeated by the stipulations in favour of mutual intercourse usual in the network of commercial treaties by which the white world is bound together, and which may be taken as expressing a general sentiment requiring that free intercourse shall be the rule. But those stipulations are vague, and are not understood to prevent the exclusion of individuals or even of classes for special reasons.

[1] Taylor, § 194.

[2] Merchant Shipping Act 1894, s. 687.

The power to exclude individuals deemed undesirable is assumed in the passport system, once universal on the continent of Europe and still far from extinct; and the power to exclude classes is assumed in the legislative exclusion of pauper aliens or of aliens arriving under contracts for employment, of which the United States, and England as to the former class, furnish an example, without its being suggested that in either country it is or would be a violation of international duty towards the states from which such aliens may come.

Thus a clause providing for free intercourse in the common form of commercial treaties would scarcely seem sufficient to compel a state which regarded Jews as a special and inferior class to receive them from a country in which they enjoy the full rights of citizenship. The objection made by the British government to the laws impeding the immigration and facilitating the expulsion of aliens, which were passed by the South African Republic before the war and the annexation of the Transvaal, was not based on any general international doctrine but on the interpretation of the convention of London.

As between states of the white race and orientals, the former, though long contented with the seclusion of their subjects in factories, as that of the Dutch at Nagasaki in Japan, have for the better part of a century past demanded freer admission for them. Probably that demand has in no case been presented as sufficient to justify war if refused, but although the various wars of this country with China have been commenced on other grounds, a fresh stage in the facility of admission has always been insisted on as one of the conditions of peace, and the rights so conceded have always been freely extended to other white powers. On the other hand the United States and the Australasian colonies of Great Britain have directed against the yellow races legislation which, being based on the national character of the immigrants, cannot be compared with such special exclusions as those of Jews, paupers or persons under contract for employment. The practice is therefore very unequal as between the great divisions of mankind, nor, since Japan has been admitted to the full communion of international rights, can the inequality be explained as a consequence of the fact that

international law has only a partial application between states of European and of other civilisation. We must admit that notwithstanding the general sentiment above referred to as existing within the white world, international law knows as yet no right independent of treaty, not even an imperfect right on which a claim to a suitable treaty might be founded, for the subjects of one state to be allowed, even with the exception of special cases, to travel, reside or trade in the territory of another.

So far as the exclusion of aliens from its territory is within the discretion of a state, it is free to exercise its discretion by expelling those already resident as well as by declining to admit them in the first instance. In most countries the power of expulsion is left to the executive department of the government, which habitually exercises it for purposes of police, subject to the restraint of opinion, which, as is natural, appears to operate more strongly against the expulsion of persons already allowed to reside than against an initial refusal of admission. Thus many conventions stipulate that expulsion shall only take place for grave causes, that the person expelled shall have the opportunity of clearing himself from accusations or suspicions, and that his state shall be notified[1]. Where the executive has the power of expulsion, the extradition of criminals is effected by an exercise of it, the officers of his own state being in readiness to receive the expelled alien at the frontier. In the United Kingdom however the executive has no such power unless expressly given to it by the legislature, as it often is by Alien Acts passed in time of war or of internal difficulty, and by the Extradition Acts, which apply when under the authority given by them the executive has concluded treaties with foreign states. Even to executives which possess the power such treaties are of value for securing reciprocity in its exercise, and for protecting them by a definition of the cases for extradition from the imputation of arbitrary conduct. The technical treatises on the subject must be referred to for the details connected with extradition. It is sufficient to notice here that a universal sentiment in western and central Europe forbids its being employed for political offences.

[1] Despagnet, § 348.

Treatment of Aliens in the Territory.

Although as between states of the white race the admission of aliens to travel, reside and trade, except in special cases, is general, they are with equal generality refused political rights, as that of voting at elections, whether parliamentary or municipal, and of exercising public functions. In England, by an act of parliament passed in 1701 (st. 12 and 13 Wm 3, c. 2) no alien is capable of any office or place of trust either civil or military. But this did not interfere with the old practice of forming juries *de medietate linguæ* for the trial of aliens, and now, by the Juries Act 1870, s. 8, aliens after ten years' residence are capable of service on juries and liable to it.

As to military services, we adhere to the principles laid down by Hall, which as he has shown are in accordance with the stipulations contained in a very large number of commercial treaties, so far as those stipulations extend. (1) "It is not permissible to enrol aliens, except with their own consent, in a force intended to be used for ordinary national or political objects. (2) Aliens may be compelled to help to maintain social order, provided that the action required of them does not overstep the limits of police as distinguished from political action. (3) They may be compelled to defend the country against an external enemy when the existence of social order or of the population itself is threatened, when, in other words, a state or part of it is threatened by an invasion of savages or uncivilised nations[1]." The convention of 1862 between France

[1] § 61. During the civil war in the United States Lord Clarendon seemed to go a little beyond this, admitting that "British subjects voluntarily domiciled in a foreign country" might be liable to service "even, to a limited extent, for the defence of the territory from foreign invasion." Instructions to Lord Lyons, *ib.*, and in the appendix to the report of the Naturalisation Commission, p. 42. Perhaps however, by saying "to a limited extent," he meant no more than to reserve the case of an invasion by savages as distinct from a political invasion. Bluntschli (*Droit International Codifié*, § 391) requires the service of aliens only "to defend a locality against brigands or savages," and mentions (as does Despagnet, § 354) that foreign governments protested to the Government of National Defence against their subjects in Paris during the siege being

and Spain, by which Spaniards born in France and Frenchmen born in Spain are made subject to military service unless they prove that they have satisfied that obligation in their own country, is represented by Despagnet as being merely a measure of mutual assistance for preventing military service being evaded to the prejudice of both armies. And he quotes with approval the blockade of the river Plate by France in 1838 and France and England in 1846, provoked by the attempt of the Argentine republic to impose on aliens the duty of serving in the army—the protest of England against British subjects being compelled to serve in the American civil war—and the abandonment by Belgium, in compliance with the protests of the powers, of her law of 1897 imposing on aliens service in the civic guard[1]. If compulsory enrolment in a civic guard or militia were allowed, although some of the purposes for which such a force may be employed might fall within the duties of foreigners, it would be impossible adequately to protect them from the exaction of services going beyond those duties.

Aliens are subject to taxation equally with nationals, and in other respects their assimilation to the latter has made great progress. The *droit d'aubaine* to which they were subject in France, and by which they were incapable of receiving or transmitting the succession to any property, movable or immovable, after early receiving some relaxation was finally abolished at the Revolution[2]. The incapacity of aliens to hold real estate was abolished in England by the Naturalisation Act 1870, but still subsists in a few countries, notably in some of the United States. And with one or two other less important exceptions of a similar character, such as their incapacity by the laws of some countries, and notably of the United Kingdom, to hold shares in ships, aliens are now allowed to acquire and enjoy all private rights.

compelled to take arms or to serve in the national guard. If ever the personal aid of aliens against a civilised enemy could be demanded, the defence of a besieged city would seem to present the strongest case.

[1] § 354.

[2] See Demangeat's *Histoire de la Condition Civile des Étrangers en France.*

Who are Nationals: Jus soli and jus sanguinis.

Historically, nationality arose out of allegiance. The sovereign lords in the dealings between whom international law had its origin belonged to a system of which the dominant character was feudal, and in feudalism the personal relation of a man to his lord was blended with the territorial relation of a fief to the lordship of which it was held[1]. By virtue of the latter the personal relation to the lord was imposed on all natives of the fief, or of the country considered as a collection of fiefs, and this *jus soli* was not inconvenient because few persons were to be met with in any country who had not been born in it except traders and other obviously casual visitors. It was therefore on birth on the soil, or on certain circumstances equivalent to birth on the soil, that the character of a natural-born subject primarily depended. By the common law of England, which fairly represents the old common law of western and central Europe on the matter, allegiance was due to the king from all persons born on land within his dominions with the exceptions presently to be mentioned, or in foreign harbours on board an English ship of war or packet enjoying the immunities of a ship of war, or at sea on board an English ship; and from children born abroad to a duly accredited English ambassador or minister[2], but not from children born on foreign

[1] It seems that sovereign is derived from *supra* and suzerain from *sursum*; that *seigneur souverain* and *seigneur suzerain* were at first used indifferently for lord paramount, with *arrière vassal* for their correlative; that about the beginning or middle of the sixteenth century *souverain* was restricted to describe the king; that *suzerain*, thus become distinguished from *souverain*, came to be used as a substantive, without the addition of *seigneur*, to denote an immediate lord with *vassal* as correlative; and that *suzeraineté* is not used before the nineteenth century to express any other than feudal relations, its employment to translate the Turkish word found in the old capitulations granted to the Danubian principalities not being really an exception, since there was a close resemblance between Turkish and western feudalism. The previous investigators of the history of these terms are referred to by Boghitchévitch (*Halbsouveränität*, pp. 87—90), whose conclusions we give.

[2] "If any of the king's ambassadors in foreign nations have children there of their wives being Englishwomen, by the common laws of England they are natural-born subjects": in *Calvin's Case*, 7 Coke 18 a. The

soil to English soldiers or sailors, though the fathers were engaged in foreign and friendly countries on the king's service[1], or merely born within the area of an English legation. The exceptional cases referred to, in which the character of a natural-born subject was not conferred by birth on English soil, were two. One, that of children born to foreign ambassadors duly accredited to the king, corresponded to the claim in favour of the children of similar English functionaries. The other was that of children born to enemy fathers at places in hostile possession, and to this a claim in favour of the children of English soldiers or sailors in analogous circumstances may have corresponded, though not distinctly traceable[2]. All those comprised by these rules as natural-born subjects were said to be born within the king's allegiance.

It was however impossible that the *jus soli* could be permanently maintained as the sole rule for determining allegiance, when the growth of order and the improvement of communications led to men being oftener accompanied in foreign travel and residence by their wives, and consequently to children being oftener born in countries not their true homes. Hence another source of allegiance was introduced, the *jus sanguinis*, descent or parentage. This is often described as a Roman principle, and so in truth it is, but in a way which requires some explanation. The personal condition of a citizen possessing the full franchise (*civis Romanus*), that of one possessing the inferior or Latin franchise (*Latinus*), that of a slave (*servus*), and that of one who was none of the foregoing (*peregrinus*), were all hereditary. If the person in question was the issue of free parents united by a lawful marriage, his condition was that of his father; otherwise, it was that of his mother; the place of his birth was unimportant in either case. And since any one

condition that the wives are Englishwomen is certainly now superfluous, and it is doubtful whether it was necessary even in Coke's time: *Bacon* v. *Bacon*, Cro. Car. 601.

[1] *De Geer* v. *Stone*, 22 Ch. D. 243.

[2] "If enemies should come into any of the king's dominions and surprise any castle or fort, and possess the same by hostility and have issue there, that issue is no subject to the king though he was born within his dominions, for that he was not born within the king's ligeance or allegiance": in *Calvin's Case*, 7 Coke 18a.

who belonged to the Roman state had one or other of the above conditions, it may be said that membership of the Roman state depended on parentage. But there was no technical term for that relation to Rome which in the case of a modern state is expressed as being a member or subject of it, for in early times the Romans had no conception of any more comprehensive state than the body of citizens, and in later times, when the conception certainly existed, the narrow technical phraseology was not duly enlarged. Free men who were alien to the body of citizens being *peregrini*, the plebeians shared that name till they acquired the franchise, and through the natural persistency of language that name was sometimes given even later to them, as well as to the free provincials who were neither *cives Romani* nor *Latini*. Finally, the subjects of the empire of all classes and aliens to it were popularly distinguished as *Romani* and *barbari*, but these were not terms of law, and so it is impossible to quote any simple Roman authority for the *jus sanguinis* governing what we now know as nationality. But the whole trend of Roman thought favoured the hereditary character of personal condition, and such was the rule for each of the particular conditions mentioned above. There was also *origo*, the tie which bound the *civis* or *municeps* of any *civitas* or *respublica* within the empire to submit to its jurisdiction and bear his part of its municipal burdens. This too was hereditary, and so far as any direct filiation can be traced or surmised between Roman practice and the modern view of parentage as a source of nationality, it is probable that the line along which we should look is rather that which leads upwards from the latter to *origo*, through the remains of ancient jurisdiction, than any pointing to the public character of a *civis Romanus*.

As a matter of clear history, the way in which the *jus sanguinis* was introduced into the European law of nationality by the side of the *jus soli* was not that of allowing the character resulting from either to be disclaimed because it conflicted with that resulting from the other. The *jus sanguinis* makes its appearance as enlarging not the choice of the individual but the grasp of the state. A nationality dependent on parentage is imposed, doubtless not without the design of safeguarding the individual from being an alien in his father's

country because he happened to be born abroad, but without reference to the attitude which the country where he was born might assume towards him, important as that might be to him. In the United Kingdom the British character was given by st. 7 Anne, c. 5, s. 3, interpreted and substantially repeated by st. 4 Geo. 2, c. 21, s. 1, to the first generation born out of the allegiance: the father of the child born abroad must not at the date of the birth be attainted of high treason, be liable to the penalties of high treason or felony in case of his returning to the kingdom without the king's license[1], or be in the actual service of any foreign prince or state in enmity with the crown. Then the st. 13 Geo. 3, c. 21, extended the character of natural-born subjects to children born out of the allegiance to fathers made natural-born subjects by the previous enactment, so that now British nationality belongs by the *jus sanguinis* to the second but not to any remoter generation. In France, in the latter days before the Revolution, the system of Pothier was established in practice: it gave French nationality not only to every child born in France, but also to the child born abroad of French parentage through males to any number of generations[2].

It was probably the Code Napoleon that set the first example of allowing an option to the person concerned, and it did so by fixing the presumption in favour of the *jus sanguinis* while allowing French nationality to be claimed by an option in favour of the *jus soli.* In the preparatory discussions on that code it was said that a child born in France to a foreign father was not attached to France by feudalism, which did not exist in the republic, or by intention, which a child could not have, or by residence unless he remained: therefore Art. 9 gave him a year from his majority in which to claim French nationality, on condition of declaring his intention to fix his domicile in France, and establishing it there within a year from the declara-

[1] This only applies to the case where the penalties would be incurred by and for the return, not to that where the return might make it possible to enforce the penalties incurred for some other fact: *Fitch* v. *Weber,* 6 Hare 51.

[2] Cogordan, *La Nationalité au point de vue des rapports Internationaux,* p. 23. The learned author says *né à l'étranger de parents français,* but it may be presumed that only the fathers were considered.

tion if not already residing there. At the same time Art. 10 declared that every person born abroad to a French father is French.

The principle of option, once introduced, came to be admitted by many states when operating for the disclaimer of their nationality as well as in favour of it. Thus, for the United Kingdom, the Naturalisation Act, 1870, s. 4, provides that a declaration of alienage may be made by any person who by reason of his having been born within H.M.'s dominions is a natural-born subject, but who also at the time of his birth became under the law of any foreign state a subject of such state and is still such subject, and by any person who was born out of H.M.'s dominions to a father being a British subject—his being under foreign subjection not being required in the latter case, a difference of which the reason is not obvious, since he may have been born in a country in which that accident will give him no right to its nationality—and he will thenceforward cease to be a British subject. He must be of full age, which, since only the loss of British and not the acquirement of foreign nationality is concerned, must mean the age of twenty-one years required by British law; and the right of declaration is not given to married women (s. 17), the British principle being that a married woman is bound to have her husband's nationality.

From the time of the Code Napoleon and under the influence of the new ideas which guided it the *jus soli* fell into disuse on the continent as the base of nationality. But the adoption of the *jus sanguinis* to any number of generations born abroad, with or without an option in favour of the *jus soli* but without its imposition, led to the existence of a class of persons practically without nationality, not reckoned as subjects by the country of their birth, notwithstanding the long residence of their ancestors on its soil, and whose subjection to the country of their parentage has through the long absence of the same ancestors become scarcely more than theoretical[1]. This was inconvenient in many ways, and especially as such *sans patrie*,

[1] Where the parentage is British, the third and subsequent generations born abroad are even theoretically without nationality unless birth on a given soil confers it on them.

heimathlosen, formed a large population exempt from the military service of the only country in a position to exact it from them, and to which by their establishment in it they were morally bound to render it. A reaction was begun in France by laws of 1851 and 1874, and culminated in the substitution of new Articles 8, 9 and 10 of the Code by laws of 1889 and 1893. As those articles now stand French nationality belongs by birth to all persons born anywhere to French fathers—to all persons born in France to foreign parents of whom one was born in France; but if only the mother was born in France, the person may decline French nationality during the year following his full age by French law (21 years), proving at the same time by official certificates that he has preserved the nationality of his parents and has submitted to perform his military duty in his country—to all persons born in France to foreign fathers and domiciled in France at the time of attaining their full age by French law, unless the person declines French nationality under the conditions mentioned in the preceding case—and to all persons born in France to foreign fathers and not domiciled in France at the time of attaining their full age by French law, if within a year from that time they undertake to fix their domicile in France, establish it there within a year from that undertaking, and claim French nationality by a declaration registered at the ministry of justice, to which however effect may be refused for unworthiness by an administrative judgment; and this may be done for minors in the same case by their fathers, surviving mothers, or guardians duly authorised, while if they submit to military service they will become French. The reaction against the *sans patrie* by giving more importance to birth on the soil has extended to some other countries, notably to Sweden as shown by a law of 1 October 1894.

In America there has not been the same tendency to adopt the *jus sanguinis* as in Europe, because the states of that continent have to deal with, and even invite, a great immigration which they cannot safely allow to remain alien, nor do they like to clog the advantages which they offer to immigrants with a necessity for the children born after their arrival to opt or be naturalised. But their maintenance of the *jus soli* has involved several of the Spanish American states in controversies with

European powers about the liability to military service of persons born on the soil to fathers not naturalised. They have in general refused to show forbearance on that point, and Spain in her treaties with them has been obliged reluctantly to admit their practice, while France, by a ministerial circular of 16 June 1873 to her representatives, has refused to protect those who will not perform their military service in France, which furnishes a sufficient practical answer to claims by the sons of French emigrants. England, maintaining her own claim on those born on her soil, is of course in no position to ask for forbearance in South America[1].

In the United States the relation of a citizen to the Union was at first founded on his being a citizen of one of the component states, but this was altered by section 1992 of the revised statutes, enacted in 1866, and the fourteenth amendment of the constitution, ratified in 1868. By the former, "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." By the latter, "all persons born or naturalised in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state in which they reside." There was thus introduced an independent citizenship of the United States, the persons possessing it being distributed among the several states by residence, just as the subjects of the United Kingdom are distributed among the British dominions by domicile[2]. The conditions for possessing this citizenship are to be found in the legislation which introduced it, which it will be observed incorporates the English common-law doctrine of the *jus soli*, handed on to the Union through the states, modified however by a declaration of congress in 1868 that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the right of life, liberty and the pursuit of happiness." The true conclusions from these data appear to be that when the father has domiciled himself in the Union he has exercised the right of expatriation claimed for him by congress, and that his children afterwards born there are not subject to any foreign

[1] See Cogordan, pp. 37—47.

[2] See above, p. 211.

power within the meaning of section 1992 but are subject to the jurisdiction of the United States within the meaning of the fourteenth amendment, therefore are citizens; but that when the father at the time of the birth is in the Union for a transient purpose his children born within it have his nationality, and probably without being allowed an option in favour of that of the United States. And these conclusions appear to be in accordance with the practice of the United States executive department[1].

With the general view which has thus been given of the parts played in the modern world by the *jus soli* and the *jus sanguinis* we must be content in a work like the present. The exceptions to one or the other principle which most states have made in order to meet practical exigencies, and which are especially liable to be varied by new legislation, present so complicated a mass of material that those who desire to know how the case stands in a given country at a given moment must be referred to the special sources of information. We believe however that Germany, Austria, Hungary, Norway, Denmark, Switzerland, Servia, Roumania, and Salvador maintain the *jus sanguinis* without qualification, claiming as theirs the children of their subjects wherever born, and allowing to birth on their soil no influence on the nationality of the children of foreign parents, and that there are few or no other states equally uncompromising in their attachment to either principle.

[1] See 2 Wharton's *Digest*, § 183. The option mentioned in the text is faintly suggested in Mr Bayard's despatch of 24 July 1886, with the proviso that the election, if such there may be, "must be made on attaining majority or shortly afterwards, and must be signified by acts plainly expressive of intention, such as immediate preparations to return to the elected country." But Mr Frelinghuysen, in his despatch of 15 January 1885, says that "the citizenship of a person so born [in the United States to a foreign father] is to be acquired in some legitimate manner through the operation of statute"; which points to naturalisation as the only remedy. Dr Taylor quotes unpublished despatches of Mr Evarts, 10 Feb. 1880, and 12 Nov. 1880, to the effect that "a person born here, although he was immediately carried abroad by his parents, has the right to elect the nationality of the United States when he arrives at full age": § 178.

Single or Double Nationality and Conflict of Nationalities.

From what has been said it sufficiently appears that the same person may be claimed as its subject by the country in which he was born on the ground of the *jus soli* and by that of which his father was a subject on the ground of the *jus sanguinis*, that the laws of those countries may not have allowed him options by the exercise of which he could acquire the same nationality in the view of both, and that if such options were allowed him he may not have exercised them; to which we may add that the options, if allowed and exercised, may not all by the laws which give them have a retroactive effect, curing the conflict as from the person's birth. To this already ample material for conflicts between states as to the nationality of given persons, we shall see that additions are made by the varying rules as to naturalisation and expatriation, and as to the connection between the nationality of wives and children and that of their husbands or parents. The conflict may arise either in a court of law or for the consideration of the executive government, but there will be this difference between the cases, that a court of law is bound by law while an executive has a certain discretion in the performance of its functions, whether granting or refusing protection or a passport, extending the prerogative of mercy to a convicted criminal, or any other. The law applied by a court will be that of its own country, subject to admitting the effects of foreign laws in accordance with the principles on that subject, to which in this treatise we can only make the most necessary and brief allusions. If for instance a man, claimed as a national both by the United Kingdom and by another country, should contract in the latter a marriage permitted by its law to its subjects, an English court would have to accept him as a married man. But in appreciating what he should do in British dominions an English court would regard only his British nationality, though the executive might be lenient[1]. It is into a conflict of this kind that every

[1] Aeneas Macdonald was a Scotchman carried to France in his early infancy, and resided there till he came over and took part in the rebellion of 1745 under a French commission, the two countries being then at war.

case of double nationality resolves itself. Claims to the same person exist on the part of different states; each of those claims asserts for him a single nationality, namely its own; and each escapes the difficulty either by a personal concession or by recognising on principles of jurisprudence the effects which the other claim has produced. This is the measure of truth contained in the answer made in 1848 by M. Crémieux, the French minister of justice, to Lord Brougham, who asked for naturalisation in France on the terms of not putting forward in that country his character of a British subject. *La France*, he said, *n'admet pas de partage, elle n'admet pas qu'un citoyen Français soit en même temps citoyen d'un autre pays. Pour devenir Français il faut que vous cessiez d'être Anglais.* So far the minister correctly expressed the singleness of nationality which international law upholds in principle, and the unreserved acceptance of that principle which is expected from every candidate for naturalisation. But when he went on to say—*vous ne pouvez être Anglais en Angleterre, Français en France. nos lois s'y opposent et il faut nécessairement opter*—his language must be taken with the qualification that, so long as states omit to arrange their claims to the nationality of persons in such manner that they can never conflict, it must remain to some extent possible to be in fact British in England and French in France[1].

He was convicted of high treason but pardoned on conditions: 18 *State Trials* 857. The result would hardly have been different had he been formally naturalised in France, having regard to the restriction for the case of return to one's original country which we shall see accompanies naturalisation.

[1] Double allegiance was familiar as a fact under the feudal system, since a man might hold fiefs under two or more sovereigns, or hold a fief under one sovereign and have been born in the dominions of another, but theoretically each sovereign held his own claim as high as if no other existed. So too when the Danish minister of foreign affairs wrote to the British representative at Copenhagen, 28 May 1863, with reference to a British subject who had taken the burgher's oath in a town of Zealand—*notre législation ne s'oppose pas à ce que la coexistence de deux nationalités puisse être admise dans la personne du même individu, seulement en principe sa qualité d'étranger ne doit porter aucune atteinte à l'accomplissement des devoirs auxquels il est astreint comme sujet Danois*—he seems to us to have referred only to the same discrepancy between principle and fact.

In the actual condition of things it would seem that international trouble can only be avoided by an understanding of which there is a close approximation to a general acceptance, namely that, in cases not provided for by treaty, no state shall extend its protection to its nationals residing in the territory of another state which claims them as its own nationals by any title known in the civilised world, whether *jus soli*, *jus sanguinis* or naturalisation. And the statement might well be extended to the case of a person's being transiently present in the territory of a state which claims him, were it not that transient presence may in some instances be capable of an explanation that would justify some intercession, though even then rather as a plea addressed to a friendly power than as questioning the right of a state to apply its own laws on its own territory. Where the conflict is that between the two first mentioned titles, the claim to protect is usually made from the side of the *jus sanguinis*, and forbearance may the more reasonably be expected from that side inasmuch as the *jus soli* is the older principle, if not in the history of the world, at least in the modern relations out of which international law has arisen. We have seen that France and Spain have practically conceded the point to the South American republics, and so does Great Britain in the case of persons falling within her laws which confer the British character on the first two generations of persons born abroad of British male descent[1]. Where the conflict arises from the return of a

Therefore, with all deference to the great authority of M. Cogordan, we cannot agree with the remark by which he follows the above quotation, made by him from the *Appendix to the Report of the Royal Commission on Naturalisation and Allegiance*, 1869, p. 66—*une doctrine absolument différente a prévalu en France* (*La Nationalité*, p. 14). France can no more escape from the fact than any other country, and the difference between the Danish statesman's doctrine and that of M. Crémieux appears to us to be one of words only. In the case of a federal union (see above, p. 35), a subject may owe allegiance at the same time to the union and to one of the federated states, and this has been presented as a case of double nationality. It is however not such in the sense in which we use the term, but a case of divided duties, all the duties of a subject being owed to one or other of the superiors according to the details of the tie between them, but none to both.

[1] As to France and Spain, see above, p. 226. As to Great Britain, see the despatches of Lord Clarendon, 24 Dec. 1857, and of Lord Malmesbury,

naturalised person to his original country which has not consented to his expatriation, that is to his loss of its nationality, the power which has naturalised him is pointed out as the one to show forbearance by the fact that it has made the conflict possible by its own act. It is accordingly a constant part of international practice in Europe not to grant protection in such a case, although it would be granted to the same person while in third countries[1]; and some states even refuse the naturalisation without proof that the applicant's former state consents to his expatriation. In the United States the matter is presented in a somewhat different aspect, partly by their assertion of expatriation as a universal right, and partly by the frequency, proportioned to the vast number of immigrants whom they receive, of transient returns of such immigrants to their former homes for purposes of business or of family, and of their being there called on to perform military service. The doctrine which ultimately governed the conduct of the United States executive was that such persons were to be protected against the exaction of what at the time of emigration was merely a future liability to serve, that to lose protection the emigrant must have done that for which he might have been tried and punished at the moment of his departure. And this has been practically accepted by France, while in Germany the matter is regulated by the treaty of 22 Feb. 1868 concluded by the United States with the North German Confederation, by which naturalisation combined with five years' residence in either is fully recognised by the other, subject, in case of the emigrant's return to his old country, to his punishment for offences committed before his emigration if prescription does not prevent; and subject to provisions that his fixing his domicile in the old country shall be deemed a renunciation of his naturalisation in the new, and that his living in the old country for more than two years may

13 March 1858, to Lord Cowley: *Report of the Naturalisation Commission, Appendix,* p. 67, and Cockburn's *Nationality,* p. 109. The former despatch adds justly that the persons in question would not be British subjects within the true meaning of a treaty concluded with their original state.

[1] The reasoning in the despatches quoted in the last note covers the case of British nationality conferred by naturalisation as well as that of its being conferred by statute.

be deemed to imply the absence of an intention to return to the new. Between the United States and Great Britain, which have not to consider the liability to military service, the matter is regulated by the convention of 13 May 1870, by which naturalisation in either is to be valid in all respects and for all purposes immediately on its completion, but if the emigrant shall renew his residence in his old country he may be readmitted to his old nationality on his application and on such conditions as the readmitting government may impose, and shall not be further claimed by the other government. The Naturalisation Act 1870 contains the provisions of British law necessary for giving effect to the convention.

Naturalisation and Expatriation.

Much of what had to be said about naturalisation has been now said, and with reason, because it is impossible to make the precise meaning of naturalisation clear without first, on the one hand, dispelling the notion that in principle and in the eye of the law of each state nationality can be any thing else than single, and on the other hand showing that, until all states adopt uniform rules for nationality, they cannot in practice extend equal protection to all whom their respective laws claim as nationals. This having been done, we may say that naturalisation is conferring the nationality of a state on an alien, the protection which he is thenceforward to receive from his new country outside its limits being that which in its practice is given in cases of the conflict of nationalities, and his rights within his new country being subject to any restrictive legislation existing in it. Examples of such restrictions are that of the presidency of the United States to natural-born citizens, and those in the British act of parliament of 1844[1], under which a naturalised person could not be a member of the privy council or of either house of parliament, and was also subject to any other restriction which the secretary of state might think fit to impose by his certificate of naturalisation. The power so conferred on the executive came to be exercised by excepting in

[1] St. 7 and 8 Vict., c. 66.

the certificate "any rights and capacities of a natural-born British subject out of and beyond the dominions of the British crown," and this in a Foreign Office circular of 8 January 1851 was declared to be done in consequence of naturalised persons having "put forward claims to receive from Her Majesty's diplomatic and consular agents abroad the same degree of protection to which the natural-born subjects of H.M. are entitled." Had the general doctrine then attained the same degree of development as now, the remedy would probably have been confined to the refusal of protection in the original countries of the persons concerned, but that the executive's discretion was all that it was intended to deal with, and not the legal character of the naturalised person as a British subject, results as well from the motive recited as from the fact that, from 1854, such rights as might "be conferred by the grant of a passport to enable him to travel in foreign parts" were excepted from the refusal in the certificate[1]. When by the grant of a passport a person was acknowledged as a British subject, it could not be from a want of that character but as a measure of caution that he failed to get further protection. The place of these provisions is now taken by the Naturalisation Act 1870, s. 7, which begins (1)[2] by authorising the issue of a certificate of naturalisation to an alien who "within such limited time before making the application...as may be allowed by one of H.M.'s principal secretaries of state, either by general order or on any special occasion, has resided in the United Kingdom for a term of not less than five years, or has been in the service of the crown for a term of not less than five years, and intends when naturalised either to reside in the United Kingdom or to serve under the crown"; but the secretary of state may refuse the application without assigning any reasons. Then (2) it is provided that "an alien to whom a certificate of naturalisation is granted shall in the United Kingdom be entitled to all political and other rights, powers and privileges, and be

[1] See Cockburn, *Nationality*, pp. 115, 116. The very learned author does not take quite the view here adopted, or at least expresses it differently, not drawing a distinction between the legal character of a subject and his right to protection abroad.

[2] The numbers here given to the parts of the section are our own.

subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom"—words which remove the former political disabilities and put the naturalised person on a par with a natural-born subject, who, in whatever way the executive may behave to him, certainly has from British law no rights, powers, privileges or obligations out of the United Kingdom. Lastly (3) the section says: "with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalisation, be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect." This, which it will be observed is not a destruction but a qualification of the character given by what precedes, limits the right of the naturalised person to protection abroad, whether by the British executive or by the British courts where they can give it on the ground of nationality, exactly as it is limited by the general understanding which we have seen growing up about the duties of states in the case of a conflict of nationalities. In our judgment therefore naturalisation under the act of 1870 is full, and British law does not deviate from the accepted view that nationality is single in principle, but the principle is tempered in practice by forbearance, extended willingly or stipulated by treaty, in the case of conflicting claims by states to the subjection of an individual.

The question whether we are right in that view becomes important when the person naturalised in the United Kingdom comes from a country which, as France[1], pronounces the expatriation of its subjects who cause themselves to be naturalised abroad. If we are right, the subject of such a state should lose his original nationality by naturalisation in the United Kingdom, and British authorities should be able to treat him as British even when he may have returned to his original country. But in 1888 Mr Justice Kay declined to appoint a guardian to an infant of the name of Bourgoise whose nationality depended on that of a father originally French, who had returned to France after naturalisation in England. He was informed by the affidavit of a French lawyer that a certificate under the

[1] Code Civil, art. 17.

Naturalisation Act 1870, qualified as it is by the clause we have numbered (3), would not be regarded in France as a full naturalisation, and would therefore not cause the loss of French nationality. His own opinion was in favour of that interpretation of the act, but on appeal, Lords Justices Cotton, Lindley and Bowen avoided giving an opinion on the point. It seems to us that the interpretation in question has merely been provoked by the fact that the section, as might be expected from an English draft, details the consequences of naturalisation in different circumstances, instead of contenting itself with granting naturalisation in broad terms and leaving the executive and the courts of law to deal as they can with the difficulties arising in their respective spheres[1].

Naturalisation effected in the British colonies or dependencies presents a question similar to that which has just been discussed

[1] See above, p. 229, note 1, the opinion of M. Cogordan, erroneous as we think, that a Danish statesman, expressing himself with similar caution, was radically opposed to the singleness of nationality in principle. There are articles on the *Bourgoise* case, which is reported both below and on appeal 41 Ch. D. 310, in the *Law Quarterly Review*, v. 4, p. 226 (Barclay); v. 5, p. 438 (Dicey); and v. 6, p. 379 (McIlwraith). Mr Barclay and Mr McIlwraith agree with the view taken by us of the effect of the Naturalisation Act 1870 on M. Bourgoise's nationality. Mr Dicey seems to lean to the opposite view, but his principal contention is that M. Bourgoise's nationality was immaterial to that of the children to whom the question of appointing a guardian arose; "in short, that the son of a naturalised British subject is, when born abroad, at birth an alien"—a point on which Lord Justice Bowen expressed a doubt in discussing the appeal. It has certainly been made clear by *De Geer* v. *Stone*, 22 Ch. D. 243, that the act of parliament which extends British nationality by the *jus sanguinis* to the second generation born abroad by male descent does not enable the last of those generations to transmit British nationality, which would be equivalent to giving an indefinite extension to the *jus sanguinis*. But the Naturalisation Act 1870 is not *in pari materia*. As the naturalised person does not come in through any statutory adoption of *jus sanguinis* or of any other rule, the question whether a rule has been adopted to a limited or an indefinite extent does not arise in his case. The object of naturalisation is to place an alien in the general position of a British subject, and his after-born children must consequently be in the general position of the children of British subjects, and able to transmit their nationality as such subjects generally can. Surely the interpretation even of the same words in different acts of parliament must be guided by the objects of the acts.

with regard to naturalisation effected in Great Britain or Ireland. By the Naturalisation Act 1870, s. 16, the legislature of any British possession may make laws "for imparting to any person the privileges or any of the privileges of naturalisation, to be enjoyed by such person within the limits of such possession." The French court of cassation, by a judgment of 14 February 1890, has held that laws made under this authority do not grant a complete naturalisation, and that therefore French nationality is not lost by accepting such naturalisation as they grant. But here again our opinion is that the British parliament cannot be held to have contemplated double nationality in principle, notwithstanding that overlapping effects may be produced by the conflict of states in conferring nationalities single in principle; that therefore complete British nationality is given by colonial naturalisation, the seemingly restrictive words in the act of 1870 being merely intended to prevent one possession from interfering with the internal law of another. The naturalised person, though no longer an alien, will continue to be subject to any disabilities, such as that to hold land, which the laws of another possession may have attached to him while he was an alien. It is in accordance with this view that the Foreign Office grants passports to persons having colonial naturalisation, and protects them everywhere except in their old country, and that the Merchant Shipping Act 1894, s. 1, allows persons naturalised in British possessions who have taken the oath of allegiance to become owners of British ships. Also, although persons naturalised under colonial laws are not expressly mentioned in any of the orders in council which regulate the exercise of British jurisdiction in foreign states, the Morocco order and that for the Persian Coast and Islands, both of 1889, apply without limitation to British subjects "by birth or naturalisation."

It may here be noticed that the king of England was always and is still able to make a person a subject without the aid of parliament, by letters of denization, but these have fallen into almost complete disuse. Their effect was to give the national character from the date of the letters, not from that of birth as naturalisation does, a difference which was important so long as aliens could not take or hold English land, its consequence

being that a denizen, the defect of what was called heritable blood not being cured in him, could not inherit land, nor could his issue born before his denization inherit it from him. And a denizen is still under certain incapacities by the st. 12 and 13 W. 3, c. 2, s. 3, passed from jealousy of the Dutch friends whom William introduced.

The doctrine of perpetual allegiance, expressed by the maxim *nemo potest exuere patriam*—no one can divest himself of his nationality by his own act—once generally prevailed. It is now as generally discarded, and a right of expatriation admitted. Many countries, as we have had occasion to notice in the case of France, disclaim their subjects who accept naturalisation abroad, while others permit expatriation without troubling themselves to enquire whether another nationality has been obtained, as Germany, which withdraws her own nationality from those who have been absent ten years from her territory without inscribing themselves at one of her consulates. Great Britain, by s. 6 of the Naturalisation Act 1870, makes the loss of its nationality the consequence of voluntarily becoming naturalised in a foreign state while in that state, but this, by s. 15, will not discharge from any liability in respect of any act done before such loss. And in most countries there are exceptions or reservations by which expatriation is either refused to those who have not performed their military obligations or is attended with penal consequences to them.

To the modes of legal expatriation must be added the practical expatriation which may arise from the action of the executive. Thus if a person, entitled by the respective laws of Great Britain and of some other country to the nationality of each, proves by his conduct that he chooses the latter as his state, and that state by its conduct accepts him as his subject, he may be treated by British authorities as an alien for the purposes of international law[1].

[1] *Drummond's Case,* 1834, on the award of the commissioners for liquidating the claims of British subjects in France; 2 Knapp 295. See the *Countess de Conway's Case,* on the same award, 2 Knapp 364, as to the circumstances in which protection may be given to one not strictly a British subject.

Nationality and Naturalisation in India.

We have referred to India as presenting an anomalous case in the classification of states, the territory in which Great Britain exercises power, or her empire in the looser sense of the word, being more extensive than that which is under her direct dominion[1]. It might be expected that this anomaly should be reproduced in the matter of nationality, and we find in fact that the subjects of "the several princes and states of India in alliance with His Majesty" stand in their relations to the British crown on different planes for different purposes. First, they do not enjoy the general rights of British subjects, and they are not included under the term "subjects" when used without express interpretation in a British act of parliament or in a law of British India. They can even be naturalised under the British Indian Naturalisation Act, no. 30 of 1852. Nevertheless, loyalty to the British sovereign is required from them as fully as from those to whom the name of subject is given. The Gaekwar of Baroda was tried for an attempt to poison the British representative at his court, under a proclamation of 13 January 1875 in which it was said: "whereas to instigate such an attempt would be a high crime against H.M. the Queen, and a breach of the condition of loyalty to the crown under which Mulhar Rao Gaekwar is recognised as ruler of the Baroda state." And that this doctrine is not applied only to the rulers appears from the case of the Manipurees who were tried and punished in 1891 for breach of the conditions of loyalty. One of them had indeed usurped the throne but had not been recognised on it by the Indian government, and that government officially enjoined "the subjects of the Manipur state to take warning by the punishments inflicted on the persons guilty of rebellion and murder." Nor is the government backward in furnishing the protection which, subject to the necessary discretion of the executive, is the correlative to the duties of subjects, and which is here all the more due in that Great Britain jealously excludes all foreign intervention on behalf of these persons. The st. 39 and 40 Vict., c. 46, declared the subjects of the native

[1] Above, p. 41.

Indian princes and states, when on the high seas or residing or being in any part of Asia or Africa which the sovereign might specify by order in council, to be entitled to the protection of the British government. And by the Foreign Jurisdiction Act 1890, s. 15, when the orders in council relating to the exercise of British jurisdiction abroad extend "to persons enjoying H.M.'s protection, that expression shall include all subjects of the several princes and states in India[1]." Further, in the treaty of 1873 with the sultan of Muskat it was agreed that in all treaties between him and Great Britain the words "British subjects" should include subjects of native Indian states, which can scarcely be regarded as any thing less than a representation to the sultan that those to be so qualified are really British subjects.

We have then to ask ourselves which of the two planes, on which stand the relations of the peoples of the native Indian states to the British crown, has the best claim to be identified with the nationality of international law; and we can scarcely doubt that the answer must be in favour of the lower and wider plane, on which stand all the relations external to the British empire in its looser sense which those peoples can have. Outside interference with the British empire in its looser sense being excluded, all those within the demarcation so established must for outside powers be its subjects and nationals, and the question whether internally they are allowed the name and rights of subjects belongs to the same category as the question whether the Filippinos are allowed the name and rights of citizens of the United States. The exclusion of international law from the relations between the king-emperor of India and the native states under his suzerainty, which we have seen to be the imperial principle[2], requires the frank adoption of international law up to the point at which the empire, including those states,

[1] The protection of persons not British subjects is contemplated by the Ottoman order of 1879, and by the Morocco, Persia, Persian Coast and Islands, and Siam orders, all of 1889. The Indians spoken of in the text would come in under these orders, though they also apply to foreigners to whom protection is extended under the practice the existence of which in the East is mentioned above, p. 206.

[2] Above, p. 42.

is marked off as one of its units. It follows that the naturalisation in so-called British India of an individual belonging to one of those native states is an act without any international significance. It merely raises him to a higher plane of rights within the empire, substituting a direct subjection to the king-emperor for an indirect one through a feudatory. But if a European or American, or any other true alien, should be naturalised under the Indian law, the same question would arise as to the effect of such an act which we have discussed with reference to the effect of naturalisation under British colonial laws, and would have to receive the same answer[1].

Native Races in Colonial Protectorates.

There is an obvious analogy between the position of the natives in a British colonial protectorate and that of the subjects of an Indian feudatory state, there being in each case the exclusion of outside interference combined with a more or less futile attempt to represent the area concerned as not being British territory. The two cases are practically dealt with in the same way. The Ottoman order in council of 1889 extends British protection to natives of any protectorate of His Majesty, and it is only for reasons of convenience that the Somaliland order 1899 and the Zanzibar order 1897 limit such protection to natives of British protectorates "beyond Africa and Arabia" in the former instance, and "beyond the dominions of the sultan of Zanzibar" in the latter.

Nationality of Wives and Minor Children.

The Naturalisation Act 1870, s. 10, provides that "a married woman shall be deemed to be a subject of the state of which her husband is for the time being a subject." This rule, though by no means of great antiquity, is now all but universally in force for the case of marriage between persons of different nationalities, perhaps the only exceptions being those of some American states in which the woman does not lose her original nationality by

[1] This is also Hall's view: *Foreign Jurisdiction of the British Crown*, § 21.

marrying a foreigner[1]. For the case of a man already married being naturalised without his wife being also expressly naturalised there is no such agreement, but two systems are met with, each of which deals with the minor children on the same principle as with the wife, though with varieties of detail in different countries. The most widely prevalent of these has for its object to secure the unity of the family. Thus by the law of Great Britain not only does the naturalisation there of a husband confer British nationality on his wife, but that of a father, or of a mother being a widow, confers it on every child of such father or mother who during infancy has become resident with the parent in any part of the United Kingdom ; and where a father, or a mother being a widow, loses British nationality, whether by the exercise of an option, by being naturalised abroad, or by marriage, the loss extends to every child of such father or mother who during infancy has become resident in his or her new country and is accepted by it as its subject[2]. And naturalisation in Germany extends, in the absence of contrary expression, to the wife and the minor children still under the *patria potestas*, and expatriation by ten years' residence abroad extends to the wife and the minor children under the *patria potestas*, if abroad with the husband or father[3].

The other system has for its principle that nationality cannot be changed without the express or implied consent of the party. Marriage with an alien is deemed to imply the wife's adoption of her husband's country, but since the naturalisation of the husband or parent involves no act of the wife or children from which their consent could be implied, they should in strictness neither acquire nor lose their nationality by reason of it. But in France, the only European country of the first

[1] Mr Bassett Moore, in a note in Dicey's *Conflict of Laws*, p. 204, quotes *Pequignot* v. *Detroit*, 16 Fed. Rep. 211, for, and *Comitis* v. *Parkerson*, 56 Fed. Rep. 556, against, a woman's loss of United States nationality by marrying an alien. Cogordan quotes Haiti (p. 262) as having enacted in 1860 that its nationality is not lost by marriage, and Venezuela and Brazil (pp. 233, 237, 444) as permitting an alien who has married a woman of the respective state to claim its citizenship.

[2] Naturalisation Act 1870, s. 10.

[3] Law of the North German Confederation of 1 June 1870, applied to the empire by the ordinance of 8 January 1873, secs. 11, 21.

magnitude in which this system exists, French nationality now accretes to the minor children of a father or surviving mother who is naturalised, subject to their option of declining it within a year from their majority[1]. In the United States the executive has acted in an analogous manner. A German naturalised there returned to Germany, thereby again becoming a German under the treaty of 1868, and taking with him a minor son born in the States after his naturalisation and therefore a natural-born citizen. The executive declined to interfere for his son's protection against the claim for the performance of military duty, made on him at the age of twenty, but the opinion given to it by the attorney-general was that, when of age, he would have the option of returning to the States and taking up the nationality of his birth which he had not lost[2].

[1] Art. 12 of the Code Civil, as modified by the law of 26 June 1889.

[2] 2 Wharton's *Digest*, § 184; Moore in Dicey's *Conflict of Laws*, p. 205. See above, p. 231, for the treaty.

Notes to Chapter X.

Pages 206, 207. (1) On 8 August 1905 the international Hague Court of arbitration pronounced a sentence in a cause between Great Britain and France, relating to the legitimacy of the grant of the French flag to dhows (*boutres*) belonging to subjects of Muscat, which struck an important blow at the indefinite right of the Western powers to grant protection in the East. The judges on the occasion were Mr Melville W. Fuller, chief justice of the United States, chosen by Great Britain; the Jonkheer A. F. de Savornin Lohman, chosen by France; and Dr Henry Lammasch, professor of international law in the university of Vienna, appointed as third arbitrator by the king of Italy. All three signed the sentence, of which the following paragraphs are worthy of textual citation.

Whereas, since the restriction which the term *protégé* underwent in virtue of the legislation of the Ottoman Porte of 1863, 1865 and 1869, especially of the Ottoman law of Sefer 23, 1280 (August 1863), implicitly accepted by the powers which enjoy the rights of capitulations—and since the treaty concluded between France and Morocco in 1863, to which a great number of other powers have acceded, and which received the sanction of the convention of Madrid of 30 July 1880—the term *protégé* embraces, in relation to states of capitulations, only the following classes;

1st, persons being subjects of a country which is under the protectorate of a power whose protection they claim;

2ndly, individuals corresponding to the classes enumerated in the treaties with Morocco of 1863 and 1880, and in the Ottoman law of 1863;

3rdly, persons who under a special treaty have been recognised as *protégés*, like those enumerated by Art. 4 of the Franco-Muscat convention of 1844; and

4thly, those individuals who can establish that they had been considered and treated as *protégés* by the power in question before the year in which the creation of new *protégés* was regulated and limited, that is to say before the year 1863, those individuals not having lost the status which they had once legitimately acquired:

Whereas, although the powers have *expressis verbis* resigned the exercise of the right to create *protégés* in unlimited number only in relation to Turkey and Morocco, nevertheless the exercise of this pretended right has been abandoned also in relation to other Oriental states, analogy having always been recognised as a means to complete the very

deficient written regulations of the capitulations as far as circumstances are analogous:

Whereas on the other hand the concession *de facto* made by Turkey, that the status of *protégés* should be transmitted to the descendants of persons who in 1863 had enjoyed the protection of a Christian power, cannot be extended by analogy to Muscat, where the circumstances are entirely dissimilar, the *protégés* of the Christian powers in Turkey being of race, nationality and religion different from their Ottoman rulers, while the inhabitants of Sur and other Muscat people who might apply for French flags are in all these respects entirely in the same condition as the other subjects of the Sultan of Muscat.

This sentence is an instructive example of what might have been foreseen, namely that in the hands of an international court international law, like the English common law in the hands of the judges, would enter on a freer course of development than could be given to it by jurists not writing with authority.

(2) The protection which France extends to Roman Catholics in the East is no longer absolute. In September 1905 the Italian mission of Saint Antonio at Constantinople having, after asking the advice of the papal delegate, applied as usual to M. Constans, the French ambassador, for protection of its interests threatened by the action of the Turkish authorities in making a new road through its property, he replied that the matter was no concern of his embassy, and that he should quite approve of their appealing to his Italian colleague. This they did, and the Marchese Imperiali undertook to assist them. *Times* correspondent at Rome, in issue of 11 November 1905.

Page 216. That an alien has no legal right to enter British territory was decided in *Musgrove* v. *Chun Teeong Toy* [1891] Ap. Ca. 272, judgment of Judicial Committee delivered by Lord Herschell.

Page 229. In the case of ties of unequal strength binding the same person to the kings of England and France, homage to both but liege homage to one, "the law of Bracton's day.... was prepared to meet the case of a war between the two kings: the amphibious baron must fight in person for his liege lord, but he must also send his due contingent of knights to the opposite army (Bracton, p. 427*b*)." 1 *Pollock and Maitland* 443.

Page 237. By a law of the United States on passports, enacted in 1907 on the request of the department of state, an American native citizen who resides more than five years, or naturalised citizen who resides more than two years, in the country of his birth, shall be deemed to have voluntarily expatriated himself, and shall not be able to claim the protection of the United States.

CHAPTER XI.

NATIONAL JURISDICTION.

General considerations: Private International Law.

After considering a sovereign or independent state in relation to its territory and the ships which carry its flag, we have considered it broadly in relation to its subjects. But many problems which arise out of these two sets of relations await our consideration, and are delicate. What is the normal protection which a state is allowed to extend to its subjects in foreign countries? When a subject is abroad, may there not be a conflict between the authorities under which he stands in respect of his local situation and his personal allegiance? If the claim of either were strained to the full extent which the crude notion of sovereignty, territorial or personal, would bear, it would cover the whole ground and leave no field for the other. The local authority might apply a uniform law and jurisdiction to all persons within its territory, whether subjects or aliens, and to all things within its territory, whether belonging to subjects or to aliens: the personal authority might insist that its subjects should everywhere be independent of any law or jurisdiction but its own. Of course no state dreams of pursuing so extravagant a course in either direction, but are there any rules by which less extravagant conflicts may be avoided, or settled if they arise? And the question affects not only the freedom of action which a subject of one state may have in the territory of another, but also the legal appreciation of the consequences of such action as he may be free to take. It is not only whether what he desires to do is forbidden—which it may be

either as a crime or as being against public policy, for example, to marry within certain degrees of consanguinity—but also what will be the legal consequences of those acts of civil life which are not forbidden but of which the consequences differ in different systems of law. Nor is the conflict between local and personal authorities the only one conceivable. Since ships, which are within the physical limits of sovereignty, can penetrate the territorial waters of foreign states, what takes place on board them may lead to a conflict between two authorities both local in their nature.

So long as we know no more of international sovereignty than that it is equivalent to independence, it will be vain to try, often as the attempt has been made, to deduce the answers to these questions from sovereignty itself: it is precisely in reconciling the independence of different authorities, in the circumstances in which the territories, ships and persons subject to them may be placed, that the difficulties arise. If there were an accepted definition of international sovereignty which did not merely negative dependence but told us positively what a sovereign state might do, we should have what we want. But it would be idle to expect such an accepted definition in a system like that of international law, which is not the work of any legislator, but has arisen by the gradual clearing up of a confusion which specially affected the limits of authority. In Germany and Italy the resuscitated phantom of the Roman empire overshadowed all other authorities without extinguishing them. In France and under continental feudalism generally, a hierarchy of graduated authorities obscured the royal power. So far from sovereignty being the key to the solution of the questions indicated, it is only by putting together the solutions which they shall have severally received that it will become possible to form the complete picture or definition of international sovereignty.

In fact we have to travel outside the life of states for no small part of the materials from which this portion of international law has been framed. The life of individuals, in the relations of family and business which they form with one another, and in the relations which arise between them and constituted authorities whether in the ordinary course of

administration or from crime, expands beyond the boundaries of the states to which they belong, and forces the life of states to take cognisance of it. And for our purpose the life of individuals is the older of the two. Prehistorical research indeed makes it probable that the really oldest units of social existence were family or other groups, on the one hand effacing the natural individual and on the other standing apart from one another like little states, but that primeval condition left few traces in the developed form of Roman law. In that system, in which only one state was contemplated, individual life was brought under legal ideas and rules, administered by courts which had to do justice in all the circumstances to which human activity might extend, and which have not the less continued to exercise that function because international sovereignty has arisen as a later product by their side, and the incidents with which they have been called on to deal have occurred under different sovereignties. Thus international law has had to recognise the jurisdiction of courts which are not international, as at least under certain conditions an authority in matters concerning individuals, even although the circumstances of the contest may be such that if history had been different it might have had to be settled by the direct action of states.

The first of the conditions, which are indispensable in order that the sovereignty of a foreign state may surrender its right to interfere, is that the intelligence and integrity of the courts whose jurisdiction is to be trusted shall be above suspicion. This condition is fulfilled in the case of those states which possess European civilisation, indeed its fulfilment is presumed in reckoning a state as belonging to the full communion of international law: not to share European ideas would not be a more fatal bar to that communion than a want of probity in carrying out those ideas, and the expedient of consular jurisdiction in foreign territory would have to be resorted to[1].

Next, the territorial courts to which so much faith and authority is given must confine themselves within the generally accepted rules of jurisdiction, which, though not originally based on any principles of public international law, have been adopted

[1] See above, p. 40.

by that law through their continued acceptance since those principles have been developed. Thus art. 14 of the Code Napoleon enacts that a foreigner, even not residing in France, may be sued in the French courts for the execution of obligations contracted by him in foreign countries towards Frenchmen. This violates the generally accepted rule that in the absence of special circumstances a man cannot be called on to defend himself before a jurisdiction to which he is not personally subject: the plaintiff is the challenger and must seek his adversary. Consequently a French judgment given under art. 14 is not binding on the defendant's state: it is not within the conditions under which that state has entrusted the protection of its subjects to foreign courts of justice. And although such a judgment would not be considered to present a case important enough for direct intervention, its exorbitant character is marked by refusing to enforce it against the defendant or his property as foreign judgments are usually enforced.

The illustration just given may be taken as a type of private international law, or, as it is also called, international private law or the conflict of laws. This is that branch of law administered by national courts—and therefore a branch of national law, since such courts have no other authority than that of the national sovereign—which deals with cases including a foreign element, whether of persons—and whether these are foreign by residence or domicile or by nationality—of things, or of occurrences. It is as impossible as unnecessary to enter on it here at length, as well because it requires a volume to itself—and that a highly technical volume, as everything concerning the law administered by national courts must be—as because it is so separate from the rest of international law both in its methods and in its origin. One characteristic of it must however be pointed out. The decision of a case involving a foreign element as often turns on the question what national law shall be applied to it as on the question what is the proper national jurisdiction to entertain it, and from this fact comes the name "conflict of laws" which we have mentioned. For instance, shall an English court apply French or English law to the marriage of a French minor in England, or to a contract made in France between parties of undoubted personal competence? The protection

due to a foreigner may depend on the right answer being given to such a question of law as well as on its being given to a question of jurisdiction, but the former kind of question is usually more technical than the latter, and so much more difficult that there is much less agreement on it even among technical persons. It is therefore very natural that statesmen and diplomats should have little to say about it, and this leads us to an observation which holds not only in the conflict of laws but, since law is always highly technical, whenever a matter in which a state is interested, for itself or for its subjects, is before a court of justice. Let that court be one of which the jurisdictional competence is clear and the integrity undoubted, an international objection is then seldom made to the legal merits of its decision.

We have spoken of the authority which in matters concerning individuals international law recognises as belonging to courts which are not international. Does that authority extend to the civil rights of states, as those of property or contract? that is, is it coextensive with the class of right concerned, whether claimed by a private person or by a state? There is no reason in the nature of the case why this should not be the rule, and much reason why it should. A natural court has better means of deciding the point raised than are possessed by diplomacy or even by an international arbitration: it is indicated as the proper authority to decide whether a civil right of property exists by the fact that, if it exists, it will have to be enjoyed under national protection: and a state may without indignity submit to a jurisdiction which it deems sufficiently enlightened and honest for its subjects to submit to. There is no general agreement on the question. In England the king may sue but cannot be sued in the ordinary course of justice: a claim against the crown is made by the extraordinary method of a petition of right. And a foreign state or sovereign cannot be made a defendant in an original suit on a personal claim[1], though it or he may sue, and will then be subject to all the proceedings in defence which could be taken against a private plaintiff. On the continent the opinions of jurists and the practice of the courts vary.

[1] See below, p. 251, note.

The most remarkable incident that has occurred of late years on the question is that between Greece and Rumania, of the succession to Vanghely Zappa, by birth a Greek of Ottoman nationality but who had obtained what is called the little naturalisation in Rumania. He bequeathed his immovable property to a public purpose in Greece, subject to a life interest which ended in 1891, whereupon the Greek government claimed to be put in possession of the inheritance in Rumania by the Greek consulate there. At the same time the nephews of the testator claimed the possession in the national court of first instance at Bukharest, on the ground that only Rumanians were allowed by a law of 1879 to acquire immovables in country districts, and then the Rumanian government intervened in the same court to claim the succession as vacant. The Greek government, by a note of $\frac{16}{28}$ May 1892, expressed "its surprise that the Rumanian state persisted in desiring to bring differences between states to the judgment of the national courts," and withdrew its representative from Bukharest, a step which led to a long interruption of diplomatic intercourse between the two states, each of which published opinions given in its favour by eminent international jurists. The faculty of law of the university of Berlin gave an opinion which is specially worthy of mention. It was that national courts are not competent as between states in matters of civil right arising out of international treaties, but are so in matters arising from pure private law, so far as regards the *forum rei sitæ*, the *forum hereditatis* and the *forum prorogatum*[1]. We differ from that opinion only in desiring that matters of civil right arising out of international treaties should not be excluded from the competence. The rights given by such treaties will in general be political, but

[1] 26 *Revue de D. I. et de L. C.* 438; and see other articles in the same volume at pp. 95 and 165, and t. 25, p. 178. The mention of the *forum rei sitæ* &c. shows why we have qualified our statement of the impossibility of suing a foreign state or sovereign in England (above, p. 250), by saying "on a personal claim." Notwithstanding the generality of the language in which that impossibility is laid down in the cases, it may be considered certain that some means would be found, in case of need, to prevent the title to property in England being withdrawn from the cognisance of the English court. We have dealt with the subject in Westlake's *Private International Law*, 4th edn, pp. 246—253.

where they are civil the parties cannot be supposed to have intended that their enjoyment should be on a different footing from that of rights otherwise arising, except in cases which are sufficiently provided for by not giving against a state a *forum rei* or a *forum rei gestæ*. The cautious wording in that respect would protect a state from being sued in a court of law for a sum of money which it might have agreed by treaty to pay.

Criminal Jurisdiction: Extradition.

Crime is conduct forbidden under threat of punishment, as distinguished from conduct of which public disapproval is only shown by imposing legal disabilities on those who practise it, or by refusing to recognise it as the source of legal duties, as gambling, of which English law marks its disapproval by refusing to recognise a legal obligation as resulting from a gambling contract, though it is not criminal except in the special circumstances in which it is visited with punishment. The motive of punishment may be the maintenance either of external order or of a standard of personal conduct, and from these points of view criminal jurisdiction has relations with both territorial and personal sovereignty. The maintenance of external order is the peculiar province of a territorial power, consequently it has never been doubted that foreigners are subject to the criminal jurisdiction of the territorial courts for what they may do in the territory, or that the criminal law to be applied to them in respect of what they may so do is that of the territorial sovereign. A personal sovereign on the other hand may claim to maintain a standard of personal conduct among his subjects, regardless whether the external order which their acts may disturb is that of his or of any other country, and whether the country in which they may act looks on what they do as disturbing its public order at all; and for that purpose he may make his criminal legislation binding on his subjects in all parts of the world, provided that he does not attempt to enforce it in violation of another territorial sovereignty, but only against the persons or property of his subjects when found within his own dominions. The English common law stood at one extreme in these respects: it punished nothing

not done in England, thus adopting fully the principle known as the territoriality of crime. At the other extreme, as we have seen in speaking of the control over nationals abroad, there are states which divest their criminal law so far as regards their subjects of all territorial limit[1]. To carry the personal principle to that length is to adopt the view that criminal law is primarily an intervention on behalf of morality. The system introduced in the United Kingdom by acts of parliament is intermediate. That it does not wholly ignore the moral view is shown by the legislation against slavery and the slave trade embracing the acts of British subjects everywhere, but the larger part of the cases in which it avails itself of the personal element in sovereignty may be explained on narrower grounds. One of these is self-defence, as appears in the enactments applying to treason and misprision or concealment of treason committed abroad by British subjects, to which may be added that applying to bigamy, since the bigamy of a subject, even if committed abroad, must tend to disturb the family relations of his own country. Another is the view that the frequency of international intercourse has caused the public order of each country to become so general an interest that all countries ought to cooperate in maintaining it, and to this may be referred the statutory liability of a British subject for murder or manslaughter committed abroad.

The view last mentioned finds another expression in the extradition of criminals, which in practice is usually regulated by treaties and laws. The former are needed in order to secure fair treatment to the persons whose extradition is claimed or granted, and, it may be added, in order to secure a reciprocity between states which national pride commonly demands, although that condition is not called for either by justice to the persons surrendered or by the real interest of the state into the territory of which they have found their way. But this general adoption of the treaty method does not imply that a state would be held free to make its territory a shelter for fugitives from justice, and thereby a nuisance to its neighbours. It may be allowed much freedom in settling the terms of an extradition treaty, for instance, what crimes shall be considered as grave

[1] See above, p. 215, on the present paragraph generally.

enough to be included in it; but that it should consent to reasonable treaties, if its constitution prevents the surrender of accused persons in reasonable cases without them, must under the necessities of modern intercourse rank as an international duty, corresponding to which other states have a real though imperfect right[1]. Further, unless the executive of a state has very large powers under the constitution[2], laws will be necessary to enable it to enter into extradition treaties, perhaps under specified conditions, or to sanction them after they have been concluded, and to lay down the procedure necessary for carrying them into effect. The British laws now regulating the subject are the extradition acts 1870 and 1873, st. 33 and 34 Vict., c. 52, and st. 37 Vict. c. 60. To these and to the special books on them, such as the excellent one by Sir Edward Clarke, readers must be referred for the details as affecting this country. The more important of the points relating to extradition from a more general point of view can best be noticed in connection with the resolutions on the subject, commonly referred to as the Oxford resolutions, which were adopted by the Institute of International Law at its Oxford meeting in 1880, Arts. 13 and 14 however being remodelled at the Geneva meeting in 1892[3].

A demand for extradition does not necessarily come from the country in which the crime has been committed. It may also be made by the state of which the accused is a subject, if the crime is one of those for which that state punishes its subjects when guilty of them abroad. In the one case the jurisdiction asserted by the demanding state is the *forum delicti commissi*, in the other the *forum rei*, which in criminal matters is the *forum*

[1] As to imperfect rights, see above, p. 156.

[2] In 1864 the executive of the United States surrendered Arguelles to Spain in the absence of a treaty and by its own authority; 2 Wharton's *Digest*, § 268; Wharton's *Conflict of Laws*, § 835, note. And in 1876 Spain surrendered Tweed to the United States in the absence of treaty, a paragraph in *Mémorial Diplomatique* explaining that the extradition had been made to the municipality of New York and not to the government of Washington, which always refused it (the precedent in Arguelles's case had not been followed): Lawrence, *Commentaire sur Wheaton*, t. 4, p. 400. An extradition treaty between the United States and Spain was concluded in 1877.

[3] Oxford, 5 *Annuaire* 127; Geneva, 12 *Annuaire* 182; the whole, *Tableau Général*, p. 104.

originis[1], or of nationality, not that of domicile; and so it may happen that the extradition of the same person is demanded by two states. In that case art. 9 of Oxford declares that the preference ought to be given to the state on the territory of which the crime has been committed, a decision justified by the probability that the witnesses will be there and cannot be carried to another country without delay and expense, and by the comparative ease with which any supplementary information that may be desired can be procured there. To take down the testimony and transmit it would be regarded as a poor substitute in countries attached to oral examination before the judge, and jury if any. Art. 6 of Oxford lays it down in more general terms as desirable that the *forum delicti commissi* should as far as possible be employed, a proposition which invites a state to surrender its own subjects for trial in the country of the crime, and this has been done by Great Britain[2]. But it is rarely or never done by other states, the practice of asserting criminal jurisdiction in respect of what is done by subjects abroad, at least in the graver cases which the treaties make the subject of extradition, having been so widely extended that the power to try is rarely lacking in the domestic law, and there being a strong feeling on the continent that, where that power is given by the domestic law, it is the right of the criminal to be tried by what are called his natural judges. Art. 7 of Oxford, taking note of this actual practice which exempts nationals from extradition, points out that at least a nationality acquired after the commission of the fact for which extradition is demanded ought not to be respected[3]. Art. 8 declares that the juris-

[1] See above, p. 222, as to the forum resulting from *origo*. On the continent the judges of the *forum originis* are described as the natural judges of an accused person.

[2] Burley, though a British subject, was surrendered by Canada to the United States: 1 *Upper Canada Law Journal*, N.S., 20. And De Tourville, a Frenchman naturalised in England, was surrendered by England to Austria in 1876, notwithstanding that by the Anglo-Austrian treaty of 1873, s. 3, it was provided that the contracting parties should not be obliged to concede the extradition of their own subjects: *Annual Register*, 1876, p. 111.

[3] Vattel does not mention extradition to the natural judge; he not only says that grave offenders are generally surrendered on the requisition of the

dictional competence claimed by the demanding state must not be in contradiction with the law of the country of refuge, but the discussion on it shows that contradiction was not intended to be inferred from silence, so that domestic legislation neither giving nor expressly condemning the *forum rei* should not be a bar to granting an extradition demanded on the ground of that forum[1]. Art. 10 completes the subject of jurisdiction in extradition by suggesting that if the same person is demanded by different states in respect of different offences, the preference should in general be given on the ground of the relative gravity of the offences, and, in case of doubt on that point, on the ground of the priority of the demand.

Arts. 11 and 12 of Oxford lay down that extradition ought only to be granted for acts which are also criminal by the law of the state on which the demand is made, and which are of some gravity, and arts. 13, 14 and 15, the two former as modified at Geneva, deal as follows with a very difficult question.

13. Extradition is inadmissible for purely political crimes or offences: Nor can it be admitted for unlawful acts of a mixed character or connected with political crimes or offences, also called relative political offences, unless in the case of crimes of great gravity from the point of view of morality and of the common law[2], such as murder, manslaughter,

sovereign in whose lands the crime has been committed, but mentions with approval the Swiss practice by which the proper magistrate of the accused hands him over to the magistrate of the place where the crime was committed, on letters rogatory from the latter: l. 2, § 76. The first instance of a refusal to surrender nationals of the country on which the demand is made is said to have been that of the Austrian Netherlands, in carrying out an extradition arrangement of 1736 with France, although no such exception was made in the arrangement; France then similarly refused on the ground of reciprocity: 2 Calvo, § 1227. It may be observed that though the word "extradition" is modern, the thing is at least as old as the twelfth century, the treaty of 1174 between England and Scotland having provided for the reciprocal surrender of persons accused of having committed felony in the other country, unless they preferred to stand trial where they were: 1 Rymer's *Fœdera* 39. The old terms in French were *restitution, remise, livraison*; and the first official occurrence of *extradition* is said to be in a French edict of 1791: 2 Calvo, § 1226.

[1] 5 *Annuaire* 113.

[2] Common opposed to political. The words translated as murder and manslaughter are *assassinat* and *meurtre*.

poisoning, mutilation, grave wounds inflicted wilfully with premeditation, attempts at crimes of that kind, outrages to property by arson, explosion or flooding, and grave robbery, especially when committed with arms and violence.

So far as concerns acts committed in the course of an insurrection or of a civil war by one of the parties engaged in the struggle and in the interest of its cause, they cannot give occasion to extradition unless they are acts of odious barbarism or vandalism forbidden by the laws of war, and then only when the civil war is at an end.

14. Criminal acts directed against the bases of all social organisation, and not only against a certain state or a certain form of government, are not considered political offences in the application of the preceding rules.

15. In any case, extradition for crimes having the characters both of political and common law crime ought not to be granted unless the demanding state gives the assurance that the person surrendered shall not be tried by extraordinary courts.

Since the fall of that diplomatic system known as the Holy Alliance, it has been agreed that the society of states does not number among its objects the propagation or maintenance of given principles of government in them respectively, nor even the prevention of revolutionary changes in their government; it follows that extradition for political offences cannot be claimed by any international right, and cannot be conceded without shocking the sentiment of free countries. The question then arises how common are to be distinguished from political offences, so that, while the latter are duly protected, the former may not enjoy under cover of politics an exemption from extradition to which they have no just claim. It is clear that motive must have much to do with the distinction, but not everything, as well because motives are often mixed as because an admissible motive may be pursued by inadmissible means. As an example of the necessity of considering motive we may take what must often happen at the commencement of an insurrection. When an insurrection is on foot it is easy to admit, with art. 13, that the line for the refusal or grant of extradition should lie between acts which are or are not allowed by the laws of war. But it may be impossible to start such a struggle otherwise than by acts, such as an attack on a sentry, which, if viewed in relation to the state of peace out of which they suddenly spring, would be undistinguishable from common crimes except by the political motive. We may say of such

acts, similarly to what we have observed about the pretension to treat insurgents as pirates, that it would be absurd to subject to extradition acts necessary for setting up a state of things in which they would not be subject to extradition[1]. As examples of the necessity of not making motive a conclusive test we may take the case of anarchists provided for in art. 14 and that of regicide. In 1856 the Belgian court of cassation, in accordance with what we venture to think must be the general opinion, opined for granting, but the *chambre des mises en accusation* of Brussels opined for refusing, the extradition of a person charged with an attempt to murder the emperor of the French by blowing up a railway train. The motive here was political and unmixed, but the Belgian extradition law was amended by enacting that attempts on the life of the head of a foreign government or of a member of his family should not be considered to be or to be connected with political offences. And a clause to that effect has since been inserted in a large number of extradition treaties, though Switzerland and Italy have refused such a clause to France, the former however reserving to the federal authority the duty of examining in any particular case whether the act in question was political or not. In Italy it was thought that a different classification of crimes from that made by the national law could not be permitted in a treaty, but this seems a strained objection, considering the different purposes of classification on such occasions[2].

Perhaps for the purpose of laying down rules more cannot be said on the distinction between political and common offences for the purpose of extradition than is said in the above art. 13, but judges and statesmen will often be aided by the consideration of motive in administering any rules on the subject[3].

[1] See above, p. 185. It has been suggested that for the purpose of extradition acts done in commencing an insurrection should be judged as they would be judged if the insurrection had been on foot when they were done. But it would often be impossible to find among acts of war any presenting in their circumstances a sufficient resemblance to those in which the act to be judged was done.

[2] 2 Calvo, §§ 1264—1268.

[3] In *Castioni's Case*, [1891] 1 Q. B. 149, Justices Denman, Hawkins and Stephen acted on the interpretation of the extradition acts proposed by

The most important of the remaining Oxford resolutions express the views generally held, and are as follows.

16. Extradition ought not to be applied to the desertion of military persons belonging either to the land or to the sea forces, nor to purely military offences.

The adoption of this rule does not prevent handing over sailors belonging either to the service of the state or to the merchant service.

The desertion of sailors in ports it is thought would be too frequent but for the reserve thus made. England had conventions for the surrender of sailors in merchantships, under the Foreign Deserters Act 1852, which contained an express exception of slaves, but that act was repealed by the Merchant Shipping Act 1894. In the eighteenth century England had such conventions for soldiers.

17. A law or treaty of extradition may be applied to facts committed before it came into force.

This is the rule for all laws of procedure, which extradition essentially is. Only substantive laws have no retroactive force.

19. It is desirable that the judicial authority in the country of refuge should be invoked, to appreciate the demand for extradition after hearing both sides.

21. The examination should have for its object the general conditions of the extradition and the probability (*vraisemblance*) of the accusation.

The extradition court in the country of refuge is in the position of a magistrate committing a prisoner for trial, and

the last mentioned in his *History of the Criminal Law of England*, v. 2, p. 71, namely that "fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of political disturbances." At the same time they made it clear that this does not include all crimes committed *in the course* of an insurrection, while on the other hand crimes committed *in furtherance* of an insurrection must not be closely scrutinised as to their being necessary for the purpose. Meunier was surrendered by Great Britain to France in 1894, Justice Cave saying: "it appears to me that in order to constitute an offence of a political character there must be two or more parties in the state, each seeking to impose the government of their own choice on the other, and that if the offence is committed by one side or the other in pursuance of that object it is a political offence, otherwise not. In the present case.....the party with whom the accused is identified by the evidence and by his own voluntary statement, namely the party of anarchy, is the enemy of all governments." Justice Collins concurred. Clarke's *Law of Extradition*, 4th edn, p. 187.

must limit itself to seeing that there is reasonable ground for the commitment, as if the trial were to take place at home instead of abroad. But special rules may be required in order to enable the court to receive for that purpose evidence sent from abroad, as the depositions of witnesses taken in foreign form or the reports of foreign magistrates charged with preparing the accusation. For this, if necessary, the extradition law must provide.

22. The government which has obtained an extradition for a given fact is bound, in the absence of a treaty to the contrary, not to allow the surrendered person to be tried or punished except for that fact.

This understanding is necessary in order to prevent the extradition of political suspects being obtained for common offences and availed of to bring them to trial or punishment for political offences. Of course it does not apply to acts done after the extradition, nor even to prior acts if the person, after being liberated, freely remains in the country to which he has been surrendered. Under the British extradition acts a prisoner cannot now be surrendered unless a condition to the effect of art. 22 is recognised by the demanding country, but the cases referred to in the correspondence between Great Britain and the United States arising out of Winslow's case, which occurred in 1876, prove that such a condition was not deemed necessary in the older practice of either country[1]. The rule was embodied in the convention of 1890 between the two countries.

23. The government which has granted an extradition can afterwards consent to the trial of the surrendered person for facts other than those for which he was surrendered, if they are such as might support extradition.

[1] See 2 Wharton's *Digest*, § 270. In Winslow's case the British government had maintained, and the United States had denied, that the rule of art. 22 applied as part of international law to extraditions under a treaty not expressly incorporating it. It is remarkable that afterwards, but before the convention of 1890, the supreme court of the United States decided in U. S. v. *Rauscher*, 119 U. S. 407, that a man surrendered under the old treaty on a charge of murder could not be tried for a minor but not extraditable offence constituted by the same facts. Art. 22 would appear to allow trial and punishment for any offence constituted by the facts alleged as the ground for extradition, whether or not technically described as in the extradition proceedings, provided that the offence would have been extraditable under the description used. This is also Dr Wharton's view of the international law: 2 *Digest*, p. 793.

24. The government which has a person in its power through an extradition cannot deliver him to another government without the consent of that which surrendered him to it.

The last provision is a further and necessary safeguard for political suspects.

Criminal Jurisdiction over aliens in respect of Facts not committed in the Territory.

As one of the conditions subject to which international law accepts national jurisdiction as an authority in matters concerning individuals, we have mentioned the rule that in the absence of special circumstances a man cannot be called on to defend himself before a jurisdiction to which he is not personally subject[1]. The illustration we then gave was drawn from the law of obligations, but it is at least equally objectionable that a man should be prosecuted criminally in a country not his own for a fact not committed in that country, such prosecution wanting both a territorial base in the locality of the crime and a personal base in the nationality of the accused, and involving the pretension of the state of the prosecution to regulate by penalties the behaviour of persons not its subjects in territory not its own. That pretension however has been made, and brings into conflict two applications of territorial sovereignty, one supporting it by reference to the place where the penalties threatened are enforced, the other rejecting it by reference to the place where it claims to regulate the behaviour of the population; and the difference of opinion about it furnishes a striking example of the impossibility of solving, from the sole contemplation of international sovereignty without a more exact definition than it has yet received, all the delicate questions arising on the scope of national jurisdiction[2]. Historically, the criminal prosecution of aliens for facts committed abroad is perhaps not traceable earlier than towards the close of the eighteenth century[3], but since that time it has been enacted in

[1] Above, p. 249.

[2] See above, p. 247.

[3] The only earlier authority in favour of it quoted by Fælix (*Droit International Privé*, l. 2, t. 9, c. 3) is that of Paul Voet, *De Statutis eorumque concursu*, sect. 11, c. 1, nos. 1 and 5.

France, Germany, Austria, Italy, Spain, Belgium and Switzerland, for offences the enumerations of which are not quite uniform but which may be described generally as being against the safety of the punishing state or its currency, so that the principle of self-defence may be invoked in support. This legislation has the sanction of the Institute of International Law, except that to the condition that "the facts constitute an attack on the social existence of the state in question and compromise its security," the Institute adds the condition that "they are not provided against by the penal law of the country in the territory of which they have taken place[1]." Russia, Greece and Mexico go further, punishing all offences committed by aliens abroad against their subjects, and the Netherlands do the same for the graver of such offences.

The international validity of the Mexican law was contested by the United States in the case of Cutting, one of their citizens who was arrested and convicted under it in 1886 for a libel on a Mexican published in the States. The matter ended by the release of the prisoner on the plaintiff (for it was not a public prosecution) withdrawing his action in order to appease the trouble, but the Department of State of the Union issued a report on the case by the assistant-secretary Mr J. Basset Moore, in which all prosecution of aliens for facts committed abroad was condemned[2]. And neither the Union nor England has given to its criminal law any operation of that description. Indeed such an extension of criminal law seems to be quite unnecessary for the maintenance of common social order. Ordinary crimes will be punished where they are committed or in the offender's country, or extradition of the offender will be granted. It is especially as a defence against attacks made on a government, whether in the press or by more active means, and which in the country where they are made are not repressed to the liking of that government, that the extension is desired. But these are the very offences for which extradition is refused, so generally is it felt that they are not matters on which

[1] In 1879, 3 *Annuaire* 231, and in 1883, 7 *Annuaire* 157.

[2] Mr Moore's report is summarised and supported by M. Albéric Rolin in an article in 20 *R. de D. I. et de L. C.* 559. The earlier proceedings in Cutting's case may be seen in 2 Wharton's *Digest*, §§ 15 and 189.

governments ought to make common cause with one another, or to facilitate prosecution in a state of which the government is an interested party. The same principle ought to prohibit any relaxation, for such objectionable purposes, of the common rules limiting national jurisdiction. Conspiracy against the government of a friendly state ought to be punishable in the *forum delicti commissi*, and usually is so. Against slighter attacks to be less sensitive is a better remedy than one which would place really harmless public writers in danger, when travelling, of punishment for some language of theirs, forgotten by them, which might be qualified by a foreign power as *lèse majesté*. We are glad that these views had the concurrence of so judicious an authority as Hall[1], and we must express the opinion that a single century of a practice which, however widely extended, does not include two such countries as Great Britain and the United States, cannot be considered to have given international validity to a very enlarged view of national jurisdiction.

An example which rests on the same principle is furnished by national legislation declaring some fact committed at sea to be piracy which is not within the international definition of that crime, as has been done by Great Britain and the United States for the case of the slave trade, and by France for that of an armed vessel navigating in time of peace with irregular papers. Such laws cannot arm the courts with the international title by which "piracy under the law of nations may be tried and punished in the courts of justice of any nation, by whomsoever and wheresoever committed": they "can only be applied by the state which has enacted them, and then with reference to its own subjects and in places within its own jurisdiction[2]." And this would be true even if the accused persons, as might sometimes happen, had voluntarily entered the territory of the state which presumed to try them, thus supplying the element necessary for an exact parallel with such a case as Cutting's. It cannot be considered that by entering a given territory an individual waives the international rules of jurisdiction which exist for his security in it.

[1] § 62.

[2] Wheaton, *Elements*, part 2, ch. 2, § 124 (Dana's numbering).

Jurisdiction in the case of Foreign Ships in Littoral Seas and Harbours.

We next come to the conflict between a right of jurisdiction resting on the basis of geographical territory, and one in which the personal element of jurisdiction is reinforced by an element so far of a territorial nature that the ship on which the right is claimed is described by a metaphor, not unreasonable if metaphor is to be admitted, as floating territory. What is true is that the ship is a scene on which the use of force is normally allowed only to the state to which she belongs, and, this being so, it cannot be overlooked that the same is true of the quarters of an army, and that therefore the case of an army permitted to march through foreign territory in time of peace presents much analogy to that of a ship in a foreign harbour. In each case the physical extent of the normal operation of a foreign force penetrates a geographical territory, and in each that circumstance is only brought about by the express or tacit permission of the geographical sovereign. Consequently, in both, the international rules of jurisdiction to be applied are often treated, especially by British and American writers, as dependent on the terms on which the geographical sovereign may be presumed to have given his consent to the presence of the foreign element. But since usage and reason furnish the only arguments which can be employed in ascertaining the terms to be presumed, that mode of treating the question is merely a veiled method of referring it to usage and reason. And it cannot even in theory be applied to the case of foreign ships passing through littoral seas, which presents the same circumstance of the interpenetration of territorial and quasi-territorial rights, since the ships are there by virtue of no permission, even tacit, but by virtue of the right of innocent passage, which has always been deemed to be reserved when the right of a land sovereign over any part of the sea has been described as one of sovereignty[1].

[1] Except in such ancient isolated and extravagant cases as are mentioned above, p. 165. If we believed in an original partition of the world, winding up a previous state of nature (which even to the school of the *jus naturæ et gentium* was probably more a way of putting an

Standing then on the ground of usage and reason, the case which may occur on land is one on which no doubt has been felt, and it may be disposed of in the words of Wheaton. "The grant of a free passage [to an army] implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require[1]."

Next, two distinctions must be made with regard to ships. One is that between public and private ships, not, it will be observed, between ships of war and merchantmen, fishing boats, yachts or other vessels of a peaceful description. The rights of a public ship in territorial waters are those of the state to which she belongs, the honour and interest of which are directly engaged in her, and are therefore no weaker when she is built, equipped or employed for trade or any other peaceful purpose than when she forms a part of the military marine[2]. The other

argument than an historical belief), we should say that nations did not agree to allow sovereignty (the old writers would oftener have said property) in the sea except subject to a right of innocent passage. Now we say that the two institutions have grown up together, sovereignty over the sea never having had a prior existence to the right of innocent passage, so that the latter cannot be considered to have been carved by concession out of the former.

[1] *Elements*; Atlay's edition, p. 155, § 99 in Dana's numbering. Chief Justice Marshall expressed himself to the same effect in the case of *the Exchange*, 7 Cranch 140.

[2] *The Parlement Belge*, L. R., 5 P. D. 197; Lords Justices James, Baggallay and Brett. Their lordships speak of the ship in question as "the property of a friendly sovereign in his public capacity, and used for purposes *treated by him* [the italics are ours] as public national services"; but they also say that to bring her under the local jurisdiction "it must be maintained either that the ship has been so used as to have been employed substantially as a mere trading ship and not substantially for national purposes, or that a use of her in part for trading purposes takes away the immunity, although she is in possession of the sovereign authority by the hands of commissioned officers and is substantially in use for national purposes." This proposition however was not really intended to narrow the doctrine involved in the first extract, for the court proceeds to get rid of the question of substantial employment by mentioning that "the ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign and to be a public vessel of the state"—a declaration on the part of the foreign sovereign which would always result

distinction turns on whether a ship is a passing one: it is that between her using the right of innocent passage and her being either in a foreign harbour or stationary or hovering in foreign littoral waters, not that between the waters in which she is. She gains nothing by the possibility that she might have availed herself of a right of innocent passage which is actually dormant, and her legal position while stationary or hovering in littoral waters will be the same as if she were in a harbour, in which that right does not exist.

Distributing our subject with reference to these distinctions, a public passing ship is entirely free from the jurisdiction of the geographical sovereign, whether in matters concerning the ship or in those concerning what takes place on board her. A public ship in a foreign harbour, or in a littoral sea but not passing, is free from the jurisdiction of the geographical sovereign in all matters concerning the ship herself, such as the title by which her state has acquired her[1], the damage which she may have done by a collision[2], the salvage which may be due for services rendered to her[3], or the possibility of seizing her in satisfaction of a debt due from her state[4]. The local jurisdiction is equally excluded in the case of disturbances on board her, those having to be dealt with by her commandant alone; but that rule does not apply "if the crew, though remaining on board, commits against other ships in the anchorage, or against the inhabitants of the port, acts of a nature to disturb public order. The local

by implication from his declining to submit to the jurisdiction—and by repudiating the notion "that any court can enquire by contentious testimony whether that declaration is or is not correct." The statement in our text is therefore supported in all its breadth by the effect of the case.

[1] *The Exchange* v. *McFaddon*, 7 Cranch 116.

[2] *The Parlement Belge*, L. R., 5 P. D. 197.

[3] *The Prins Frederik*, 2 Dodson 451; *The Constitution*, L. R., 4 P. D. 39. The cargo of the *Constitution* was held to be equally free from the local jurisdiction on the claim for salvage. The judge, Sir R. Phillimore, said "it is on board a foreign vessel of war, and is under the charge of a foreign government for public purposes"; 48 L. J., N. S., P. D. and A. 15.

[4] Bynkershoek mentions the seizure of Spanish ships of war at Flushing for a debt due from the king of Spain. The states general interposed, and the ships seem to have been released: Marshall, C. J., 7 Cranch 145.

authority has in that case a full right to take the measures necessary in the interest of general security, and may even require the foreign ship of war to quit the port. When the crew is on shore and there commits offences, they are triable by the ordinary courts; only the facts ought to be brought at once to the knowledge of the commandant of the ship, and an arrangement should be made with him for the prosecution and punishment of the offenders either by the local courts or by the military authorities of the ship. In logic, the exclusive competence of the courts of the port ought to be admitted; but the wish to keep on good terms with foreign powers has caused this extension of the maritime jurisdiction of the foreign state to be currently adopted in practice[1]."

With regard to persons betaking themselves for protection to a foreign public ship in territorial waters and not merely passing, the general rule must be distinguished from the conduct to be observed in the case of political refugees or in that of slaves. The local interest that asylum shall not be granted to common criminals is not encountered by any contrary interest of the ship or her state, but the political and social feelings of the latter deserve at least some degree of respect under the immediate shadow of her public flag, as they do when the action of a government is concerned in dealing with demands for extradition. Taking first the general rule, the United States attorney-general Bradford gave in 1794 the opinion that "a writ of *habeas corpus* may be awarded to bring up an American subject unlawfully detained on board a foreign ship of war[2]." And Lord Stowell, then Sir W. Scott, in answer to a question put to him by the admiralty "whether any British subject, coming on board any of H.M.'s ships of war in a foreign port, escaping from civil or criminal process in such port and from the jurisdiction of the state within whose territory such port may be situated, is entitled to the protection of the British flag"—said "I know of no such right of protection belonging to the British flag.....I am led to think that the Spaniards would not have been chargeable with illegal violence if they had thought proper to employ force in taking this person out of the British

[1] Bluntschli, *Droit International Codifié*, § 321.

[2] 1 Wharton's *Digest*, § 36.

vessel," which was H.M.S. Tyne lying in the port of Callao[1]. And Lord Palmerston was "of the opinion that it would not be right to receive and harbour on board a British ship of war any person flying from justice on a criminal charge, or who was escaping from the sentence of a court of law[2]." There is therefore a consensus of high authorities in favour of the proposition that the local jurisdiction as to crime committed outside a foreign public ship is not ousted by an escape to her deck, and an opinion given by the United States attorney-general Cushing during the Crimean war, which is sometimes quoted against it, only affirmed the very different point that a prisoner of war brought into a United States port on board a foreign ship of war or her prize could not be taken out of her by *habeas corpus*[3]. Such a prisoner would clearly be under the military jurisdiction of the foreign state, which we have seen to be respected both in the case of disturbances on board a public ship and in that of an army allowed to cross a territory on land.

The exceptional protection extended to political refugees by a public ship in a foreign harbour was not only rather vaguely acknowledged as we have seen by Lord Stowell, but was broadly asserted by Lord Palmerston in the same communication from which we have quoted his opinion on the case of common criminals. In that communication he gives the following practical instructions about it. "Although the commander of a ship of war should not seek out or invite political refugees, yet he ought not to turn away or give up any who may reach his ship and have obtained admittance on board. Such officer

[1] *Report of Royal Commission on Fugitive Slaves*, pp. lxxvi, 226. The person in question was John Brown, a political refugee, who was brought by the Tyne to England and there dismissed without restraint. Lord Stowell reserved the possibility that cases might arise in which such protection as was given by the Tyne "might be indulged, but," he added, "such cases are justified only by their own peculiar and extraordinary circumstances, which extend no further than to those immediate cases themselves, and furnish no rule of general practice in such as are ordinary. How far the case of Mr Brown comes within such a description I am not enabled to state confidently by any exact knowledge of the facts."

[2] Communication from the Foreign Office to the Admiralty, 4 Aug. 1849; *ib.*, p. 155.

[3] 1 Wharton's *Digest*, § 36.

must of course take care that such refugees shall not carry on from on board his ship any political correspondence with their partisans on shore, and he ought to avail himself of the earliest opportunity to send them to some place of safety elsewhere." This correctly expresses the conduct which the navies of states internally free follow in their visits to foreign ports.

The case of refugee slaves is not parallel to that of political refugees, for it concerns the permanent institutions of the country visited by the ship, and these might be seriously disturbed if the rule of not turning away or giving up any who may have succeeded in getting on board were extended to slaves. Yet here also some respect is demanded by the feelings of nations which reject slavery, and it has been found difficult to arrange a *modus vivendi* between such nations and the slave-holding peoples which their public ships may visit. No settled rules had in fact been arrived at before the importance of the question as one of general international law had been destroyed by the universal abandonment of slavery among the peoples of European civilisation who alone are admitted to the full communion of that law. As between Great Britain and the slave-holding peoples of other civilisations which are visited by the British navy, among which rank conspicuously those of Arabia and Persia whose coasts are resorted to for trade or for the pearl fishery by Indians requiring British protection, the subject is therefore left open to be regulated on the particular considerations arising. And readers who desire information on it may be referred to the Report of the Royal Commission on Fugitive Slaves, 1876.

In the case of a private ship the foreign jurisdiction which has penetrated the geographical sphere of the local one, not being exercised by a naval officer but by a private captain or by a consul acting in pursuance of a treaty between the foreign and the local state, does not place the dignity of the foreign state so directly at issue, and is less capable of satisfying emergencies. A larger range therefore is allowed to the local jurisdiction. Matters concerning the ship herself, as the proprietary title to her, damage done by her, salvage due from her, or her seizure in satisfaction of a debt, will belong to the local courts whenever referred to them by the accepted rules of national jurisdiction

applied to her actual situation or to the persons of her owners or others interested in her. If her crew, whether on shore or while remaining on board, commit offences against other ships in the anchorage or against the inhabitants of the land, the local courts will punish them, and the local authorities will not be under the necessity of requiring her to quit their waters but will use on board of her whatever force may be needed. Even offences committed on board her against persons and things also on board her will fall under the local jurisdiction if, in the words of the Institute of International Law which we have quoted, they "involve a violation of the rights or interest of the littoral state or of its subjects not forming part of its crew or passengers[1]." And all this will be equally true of private ships exercising the right of innocent passage, although in their case the occasions for applying it will be rare. The Territorial Waters Jurisdiction Act 1878 recognises the doctrine by declaring in general terms that "offences committed on the open sea within the territorial waters of H.M.'s dominions" are within British jurisdiction (sect. 2), while requiring (sect. 3) the consent of a secretary of state or of the governor of a British dominion for the institution of proceedings. Thus, before there can be a practical assertion of jurisdiction over persons on board passing ships, an opportunity is given to the executive authority of the state for considering the principles by which such an assertion ought to be limited, while the difficulty is avoided of giving to those principles so exact a definition as English courts of law are accustomed to require of the rules which they administer.

If such an exact definition were attempted the question would arise whether the interests of the littoral state in the language of the Institute, or its peace and tranquillity as is often said in expressing the same idea, are to be understood only in a material sense, or whether the moral perturbation which a crime committed on board a ship would cause on shore is sufficient to call the local jurisdiction into lawful activity. The latter view has been generally adopted for cases of grave crime, even although those who are physically injured belong to the ship, and this not only from the probability that the mental

[1] Art. 6, above, p. 193. The reservation made for public ships in art. 9, p. 194, reduces the scope of art. 6 to private ships.

excitement of the population may lead to material disturbance, but because it concerns the duty and dignity of a country to see that grave crime committed within its geographical limits does not go unpunished[1]. If the offence were committed on board against a person belonging to the shore, the injury to the littoral state would be too unmistakable for the local right of interference to be questioned, whatever the gravity of the fact; and we agree with Ortolan that the same would be true in the case of an offence committed on board against any one by a stranger to the ship. In case of doubt to which of the jurisdictions a case most appropriately belongs, the local government (either by its

[1] In the cases of *The Sally* and *The Newton*, 1806, private vessels of the United States in French ports, jurisdiction in respect of offences of no great importance, committed on board them by and upon persons belonging to them, was claimed by the United States consuls and by the local judicial authorities. The council of state decided against the latter on the ground that their assistance had not been asked for and that the tranquillity of the ports had not been compromised. In the case of the Swedish vessel *Forsattning* in the Loire, 1837, the council of state directed the surrender to her commandant of one of the crew who was accused of poisoning some of his fellow seamen. But it seems that this was felt to have been wrong, and in 1859 the court of cassation maintained the conviction of Jally, the mate of the United States merchantman *Tempest*, for the murder of one of his sailors committed on board. All these cases are given in Ortolan, *Diplomatie de la mer*, l. 2, c. 13, and Annexe J. But the supreme court of Mexico held, 1876, that that state had no jurisdiction in the case of the murder of one Frenchman by another on board the French merchantman *Anémone*, the tranquillity of the inhabitants of the port not having been disturbed, and the people of the ship having simply brought the body on shore without making an accusation or asking protection: 3 *Journal Clunet* (*J. d. D. I. P. et de la L. C.*), p. 413. This however is a rare exception. In conformity with the case of *The Tempest* and the opinion of Ortolan the supreme court of the United States, 1886, refused to deliver to his consul on *habeas corpus* a Belgian who had killed a fellow seaman on board a Belgian steamer moored to a dock in New Jersey: *Wildenhus's Case*, 120 U.S. 1. It may be observed that when the local jurisdiction deems the case to be not one for itself, the jurisdiction of the ship's commandant or of the consul of the ship's nation may extend over persons not members of that nation who, by enlistment in its crew, have made themselves subject to the ship's internal discipline: *in re Ross*, 140 U.S. 453, in which the punishment by the United States consular court in Japan of a British sailor forming part of the crew of a United States ship was upheld by the supreme court.

executive or by its judicial department as the constitution may require) will have to decide between them, and thus it may be said from one point of view that the foreign jurisdiction is only admitted by concession. But from what in our judgment is a more correct point of view it should be described as based on an international right, which cannot be ignored though for its full enjoyment it may require the action of some authority bound to apply principles in good faith[1].

When a disturbance occurs on board a foreign private ship, and the local authority treats it as beyond its jurisdiction, that authority ought, if required, to lend assistance to the captain or consul in support of his jurisdiction. To permit anarchy must always be a breach of its duty. This rule has however to be considered in connection with the question of slavery. A private ship in territorial waters is not an asylum—we need not say for common criminals, for whom a public ship is not an asylum—but not even for political refugees or slaves escaping to her. If she brings persons who by the law of her state are slaves into a port of a country where slavery is not allowed, the local authority will not be justified in inciting them to rise, but it will not be bound to assist the captain or consul in holding them down. The moral objection will override the general rule of assistance. If they rise, the local authority should warn the ship to leave its waters; and if she cannot or does not leave them it may be under the necessity of interfering in order to put a stop to anarchy, in which case the slaves will practically be freed[2].

[1] See what we have said, p. 195, on the predominant (not exclusive) part which the geographical sovereignty of the littoral state gives it in deciding on new cases. And consider the analogy between this matter and those, as extradition and the navigation of international rivers, on which we have maintained the doctrine of imperfect rights.

[2] Mr Bates, a highly respectable merchant of United States nationality, employed as umpire between his country and Great Britain in the case of *The Creole*, gave in 1853 a judgment too favourable to slavery. See Moore's *International Arbitrations of the U.S.A.*, p. 410. In *Scott's Cases on I. L.*, p. 255 (Freeman Snow, p. 138), an opinion of Dana on that judgment is quoted agreeing with what is said in our text.

Diplomatic Immunities from Jurisdiction: Exterritoriality.

We have now to consider the limits of national jurisdiction with reference to the persons composing legations, whether embassies or of inferior rank, and their suite, and to the houses and precincts occupied by them. A legation is not like a ship, a scene on which the quasi-territorial authority of a state is habitually exerted, so that its occasional presence within foreign geographical limits exhibits the interpenetration of two jurisdictions resting on similar principles, a *modus vivendi* between which must therefore be found. The members of a legation merely have a certain personal character which makes it necessary or convenient for the intercourse of states that they should enjoy a certain immunity from the territorial jurisdiction of the country in which their diplomatic functions require them to reside, and the suite and precincts of a legation merely enjoy certain privileges auxiliary to those of the members and to the quiet indispensable to the performance of their duties by the latter. Historically these exceptional rights cannot be traced to a single source. The inviolability of ambassadors is a principle known even to savages, but it belongs to a state of war, to which without it a termination would be difficult, or to a state of such peace as may exist among savages, in which the approach of members of another tribe is not freely permitted. When so much civilisation has been attained that all foreigners are inviolable except so far as they may be arrested under process of law, the inviolability of ambassadors in time of peace means no more than the special immunity from such process which is accorded to them, although it is probable that the sanctity with which the older notion fenced them may have helped to give that immunity a larger measure than for diplomatic purposes is necessary. A contributory cause has been the jealous dignity of the sovereigns of monarchical states, whose persons are deemed to be represented by ambassadors, while the latter have set the measure of the professional privileges shared by diplomats of lower rank though only agents for business. Then came the desire to find a juridical ground for privileges already enjoyed, which led to the fiction that the

precincts of a legation are part of the territory of the state which sends it, and consequently to the term "exterritoriality," indicative of absence or exclusion from the geographical territory, being used to describe the legal position of diplomats and their precincts. The logical result of that fiction would be to give the ambassador and the state represented by him a larger authority within the precincts than even a sovereign has ever had in the quarters occupied by him when travelling; at the same time the fiction is unnecessary for holding that a diplomat's domicile is unchanged by his mission, that conclusion following, on the common principles about domicile, from the nature and precarious duration of the mission. This being now recognised, exterritoriality is no longer used as a starting-point for deductive reasoning by which diplomatic immunities may be measured: it is an expression which sums them up as they exist. The same expression is also often used for the legal position of foreign ships in territorial waters, but since that is not the same as the diplomatic position it seems better to reserve it for the latter, in connection with which the term was first used.

The first point to be noted about diplomatic immunities is that they are an affair between the state which sends the legation and that which receives it: ambassadors passing through third states can claim from them no more than courteous treatment and such facilities for their mission as they can grant without damage to themselves, and ambassadors falling into the hands of enemy states may be treated by them as other enemies may be. Accordingly no complaint could be or was made when in 1744 the Maréchal de Belleisle, charged with an embassy from France to Prussia, was arrested in crossing the electorate of Hanover, allied with England in war against France, and sent to England as a prisoner of war. And in 1854 the French government was ready to allow Mr Soulé, the United States minister accredited to Spain, to pass through France on his way to his post, but not, on account of his antecedents, to make any stay in the country. If the third state which has the power of affecting an ambassador is the enemy, not of his state, but of the state to which he is sent, it must not impede the exercise of his functions without urgent military necessity or the existence of grave reason for suspecting the sincerity or discretion of his

conduct or of that of his state towards it. The accrediting as well as the receiving state is interested in those functions, and that they may prove beneficial to the latter will not justify their interruption to the prejudice of the former. During the siege of Paris in 1870 the German authorities announced their intention to give passage to the despatches of the foreign ministers shut up in that city only if they were open. The ministers, and the United States whose minister was one of them, protested, but the representative of the United States, to whom the protection of Prussian subjects at Paris had been entrusted, was alone allowed to receive and send his despatches sealed. The correspondence between Washington and Germany on the subject, and on some detention of the despatches, does not seem to betray any serious difference as to the principles. It is true that Mr Fish wrote that "the rights of legation under such circumstances must be regarded as paramount to any belligerent right." But he added, somewhat inconsistently: "they ought not to be questioned or curtailed unless the attacking party has good reason to believe that they will be abused, or unless some military necessity, which upon proper statement must be regarded as obvious, shall require the curtailment." And Count Bismarck wrote to the minister in Paris: "the delay occurring now and then in the transmission of your despatch bag is not occasioned by any doubt as to the right of your government to correspond with you, but by obstacles which it was out of my power to remove." The obstacle which he mentioned was a rule adopted by the general staff of the German army that no sealed packages or letters should pass through their lines in either direction without a stoppage of several days[1].

[1] 1 Wharton's *Digest*, § 97; both for this and for Mr Soulé's case; 1 Calvo, § 602, for the case of 1870. Grotius does not seem to have thought that any particular consideration was due to the embassy of a friendly state. In laying down the rule that third states are not obliged to treat ambassadors as inviolable, he classes together the cases *siquidem ad hostes eorum eunt aut ab hostibus veniunt*: l. 2, c. 18, § 5. It must be noticed that, contrary to the opinion which we have expressed in the text, the judges of the state of New York have extended the diplomatic immunity from civil suit to the diplomatic agents of foreign powers passing through the state on their way to the countries to which they are

Coming now to what is due from the state receiving a mission, we will take first what is due to the members of it who belong to the diplomatic service in any rank, down even to that of attachés. These are exempt from the criminal jurisdiction of the territory. That indeed was a moot point in the time of Grotius, though the differences which he mentions were probably more in theory than in practice[1], but a century later we find it to be a settled practice, in accordance with his opinion, that an ambassador, even guilty of conspiracy against the government to which he is accredited, can only be sent away, or at most arrested and detained until it is known how his government will treat the affair[2]. This was done, and the papers of the delinquent were examined, by England in 1717, when the Swedish ambassador, Count Gyllenborg, engaged in a Jacobite conspiracy[3], and by France in 1718, when the Spanish ambassador, the Prince of Cellamare, organised a conspiracy against the regent[4]; and on each occasion the diplomatic world was generally satisfied of the correctness of the proceeding, the only dissent expressed when the facts were known being that of the Spanish ambassador to Great Britain in the former case.

accredited: *Wilson* v. *Guzman Blanco,* 56 N. Y. Superior Court 582. They have on their side, among other authorities, Wheaton (*Elements,* §§ 246, 247—Dana's numbering) and Twiss (*Law of Nations in Time of Peace,* § 222), who speak of a sacred character, Wheaton also assimilating an ambassador on his route to a travelling sovereign. But Bynkershoek (*de Foro Legatorum,* c. 9) is against them, and immunity from suit is not necessary to inviolability, even were an ambassador in a third country more inviolable than any one else now is.

[1] Queen Elizabeth was advised in the case of the bishop of Ross, ambassador of Mary queen of Scots, by English lawyers, that an ambassador conspiring against the sovereign who had received him, might, and in the case of Mendoza, ambassador of Spain, by Albericus Gentilis and Hottoman, that he might not be punished by that sovereign. Both were sent away. 2 Ward's *Enquiry into the Foundation and History of the Law of Nations,* 487, quoting Burleigh's State Papers for the bishop's case; and 523, quoting Zouch, *Solut. Quæst.* 130, for Mendoza's case.

[2] Grotius, l. 2, c. 18, § 4. He says that in case of extreme necessity *et retineri et interrogari legati poterunt.* This would not be so in England where the interrogation of accused persons is unknown.

[3] Martens, 1 *Causes Célèbres,* 75.

[4] *Ib.* 139.

As to the civil jurisdiction of the country to which a mission is accredited, the facts that its members do not acquire a domicile in it by their diplomatic residence and that they very seldom belong to its nationality prevent a large part of the possible causes of suit against them from falling within that jurisdiction. The Institute of International Law has expressed the opinion that where they do possess that nationality they ought not to be able to claim immunity from suit, but it has been held in England that a British subject received as a member of a foreign mission will have the privileges of exterritoriality so far as the government has not expressly excluded them in its reception of him[1]. Where a suit would be entertainable against an ordinary person notwithstanding his foreign domicile and nationality, distinctions may be drawn.

It is generally admitted that a diplomatic person is exempt from the territorial jurisdiction on engagements contracted by him either in his official capacity, or in a purely private as distinguished from a mercantile or professional capacity, and that so much of his property, movable or immovable, as is necessary to his dignity and comfort cannot be seized for any debt. But opinions and the practice of courts differ as to points beyond these, and since in such circumstances no international agreement can be asserted the question is one for national law, on which we cannot here enter into details. It is enough to say that in England the widest views as to diplomatic immunity are adopted. The st. 7 Anne, c. 12[2], which is the most formal document we have on the subject, declares the goods of an ambassador or other public minister without limitation to be incapable of distraint or seizure, and makes no exception on the ground of trade to his immunity from suit, but only excludes from the benefit of the act any person "within the description of any of the statutes against bankrupts who shall put himself into the service of any such ambassador or public minister." And though in one case it seems to have been thought,

[1] 14 *Annuaire*, p. 244; art. 15 of resolutions of 1895. *Macartney* v. *Garbutt*, L. R., 24 Q. B. D. 368.

[2] This act was passed in consequence of the ambassador of the Czar being arrested, and has always been considered in England as declaratory and not innovating.

somewhat doubtingly, that a foreign minister who engages in commercial transactions may be made a nominal defendant to a suit "merely for the purpose of ascertaining the liability of the other defendants," no attempt being made to enforce against him any judgment which may be obtained[1], a later case decides against that view[2]. Again, although Wheaton says that "the hotel in which [a foreign minister] resides, though exempt from the quartering of troops, is subject to taxation in common with the other real property of the country, whether it belongs to him or to his government[3]," yet it has been held in England that the payment of local rates cannot be enforced by suit or distress against a member of a mission[4], and the same would no doubt be held in the case of national taxes.

A further immunity which may be noticed is that a foreign minister "is exempt from the payment of duties on the importation of articles for his own personal use and that of his family. But this exemption is at present, by the usage of most nations, limited to a fixed sum during the continuance of the mission. He is liable to the payment of tolls and postages[5]."

The immunity of a diplomatic person from jurisdiction includes his not being compellable to give evidence in court, and this privilege is usually insisted on in practice, though such

[1] *Taylor* v. *Best*, 14 C. B. 487.

[2] *Magdalena Steam Navigation Company* v. *Martin*, 2 E. and E. 94. "If the ambassador has contracted jointly with others, the objection that he is not joined as a defendant may be met by showing that he is not liable to be sued": p. 115.

[3] *Elements*, § 242, Dana's numbering. As to the enforcement of liens on the effects of a diplomatic person, it will be useful to refer to the dispute which Wheaton had at Berlin about the enforcement of a lien on his furniture for rent due for his dwellinghouse, which he recounts and argues at great length: *ib.*, §§ 227—241. He admits, however, § 227, that "any other real property or immovables [besides his dwellinghouse] of which he may be possessed within the foreign territory is subject to its laws and jurisdiction. Nor," he says, "is the personal property of which he may be possessed as a merchant carrying on trade, or in a fiduciary character as an executor &c., exempt from the operation of the local laws."

[4] *Parkinson* v. *Potter*, 16 Q. B. 152; *Macartney* v. *Garbutt*, L. R., 24 Q. B. D. 368.

[5] Wheaton's *Elements*, § 242. See Lehr, in 7 *R. de D. I. et de L. C.*, 2me série, p. 414.

persons are usually ready when their evidence is required to make declarations on oath out of court, refusing to be cross-examined on them[1]. Whether any use can be made of such declarations against a person on trial, or otherwise in a suit, must depend on the national law of the country in which the proceedings are taken.

If the result of his diplomatic immunities should be that a member of a foreign mission should not pay his just debts, complaint must be made to his government. In 1772 the French government refused to give to the Baron de Wrech, minister plenipotentiary of the landgrave of Hesse-Cassel, the passports necessary for his quitting Paris, until the landgrave made an arrangement with his creditors[2].

Diplomatic immunities are not enjoyed by consuls resident in states of European civilisation. They are only agents for their governments so far as these are concerned with the affairs of individuals, and have no part in the political or even the general commercial representation of their states, which is carried on by a different description of functionaries; but in the east Christian powers have appointed consuls with a diplomatic in addition to their properly consular character, and such accordingly have the privileges belonging to their higher employment. Even in the European and American world consuls are occasionally attached to legations as members or assistants, and will then have the immunities proper to such service. It is in this sense that the position of consuls is now generally settled, notwithstanding various attempts, chiefly by France or French writers, to rate it higher[3].

[1] *Dubois' Case*, which occurred in 1856 at Washington: Lawrence's *Wheaton*, p. 393, note 127; 1 Wharton's *Digest*, § 98. The Venezuelan minister, by the instructions of his government, gave evidence in court on the trial of the murderer of President Garfield, out of respect for his memory and friendship to the United States: *Guiteau's Case*; 1 Wharton's *Digest*, § 98. In *Dillon's Case* (*ib.*), the question arose in the United States whether a French consul enjoys the diplomatic freedom from being compelled to give evidence, and was practically settled in favour of France, which country rates consuls high.

[2] Martens, 2 *Causes Célèbres* 110.

[3] 1 Calvo, §§ 459, 460. See *Dillon's Case*, mentioned in note 1 on this page. England and the United States have always maintained this view

Besides the persons who are on the diplomatic staff of the mission, immunity from the territorial jurisdiction, civil or criminal, is generally enjoyed by those who are living with them as part of their family or household, and to those who are in their fixed service, as distinguished from persons, such as workmen, occasionally employed by them. But the service must be real and not colourable[1], and the immunity will not extend to matters quite unconnected with the service[2]; also the ambassador or minister may waive the immunity of any one not on the diplomatic staff, but not his own or that of a member of the mission, their immunity being the right of their state[3]. He usually furnishes to the local authorities a list of the members and suite of his mission, but to be named on such a list "is no condition precedent to the being entitled to the privilege of a public minister's servant[4]." An attempt made by the court of Bavaria in 1790 to assert the local jurisdiction over persons in attendance on the members of a mission did not succeed in attracting sympathy[5]. The exception which obliged us to limit our statement of the foregoing by the word "generally" is that in England an exemption from the local criminal jurisdiction is not allowed to any one not on the diplomatic staff. Thus in 1653, under Cromwell, Don Pantaleon Sa, brother of the Portuguese ambassador, was tried and executed for murder; and

of the position of consuls: *Buvot* v. *Barbut*, or *Barbuit's Case*, Cas. Temp. Talbot 281, quoted with approval by Lord Mansfield in *Triquet* v. *Bath*, 3 Burrows 1480, and in *Heathfield* v. *Chilton*, 4 Burrows 2016; *Clarke* v. *Cretico*, 1 Taunt. 106; *Viveash* v. *Becker*, 3 M. and S. 284; *Commonwealth* v. *Kosloff*, 5 Serg. and Rawle (Pennsylvania) 545; Mr Justice Story in *The Anne*, 3 Wheaton 445.

[1] *Triquet* v. *Bath*, 3 Burrows 1478; *Lockwood* v. *Coysgarne*, 3 Burrows 1676; *Heathfield* v. *Chilton*, 4 Burrows 2015; *Fisher* v. *Begrez*, 1 C. and M. 117, 2 C. and M. 240; *in re Cloete*, 65 L. T. 102.

[2] In *Novello* v. *Toogood* a chorister of the Portuguese ambassador was held liable to distress for poor rates in respect of a house in which, and not in the ambassador's house, he lived, and in which he let lodgings: 1 B. and C. 554.

[3] *U.S.* v. *Benner*, Bald. 234, quoted in Scott's *Cases on International Law*, p. 196.

[4] Lord Mansfield in *Heathfield* v. *Chilton*, u.s., Justice Ashton concurring.

[5] Martens, 2 *Nouvelles Causes Célèbres*, 22.

in 1827 the Foreign Office justified the arrest of the coachman of Mr Gallatin, the United States minister, for an assault, although the arrest was made in the minister's stable, only admitting "that courtesy requires that their houses [those of foreign ministers] should not be entered without permission being first solicited, in cases where no urgent necessity presses for the immediate capture of an offender[1]."

The Precincts of Legations: Asylum in them.

It is with reference to the precincts of legations that the fiction of exterritoriality the most ran riot. Large quarters of cities were sometimes included in those precincts, and every inference was practically drawn which could follow in logic from their being held to be parts of the ambassador's country. No process of the territorial law could be executed in them, and hence they became the refuges and haunts of criminals and debtors, an Alsatia. On the other hand the foreign sovereign and his ambassador were held to have in them a jurisdiction which, from the want of means to organise it, could not remedy the mischief, even were it not an offence to the territorial power for which logic could not atone. As late as 1867, a Russian subject, Mickilchenkorff, having committed an attempt to murder in the Russian embassy at Paris, and having been arrested and his prosecution commenced by the French authorities, the ambassador disputed their competence and claimed his extradition. But such a notion was quite antiquated, and the French government refused to admit that the fiction of exterritoriality could have such a scope, independently of the fact that on the occurrence of the outrage the Russians had themselves called for the aid of the local force[2]. One of the first influences to effect a breach in the old system was the desire of the power represented not to make its legation the harbour for rebels and conspirators against the territorial sovereign, a desire founded on mutual courtesy and on a sentiment of the solidarity of governments; and thus political refugees, in whose favour the last vestiges of the system now exist, were among the first to be

[1] Lawrence's *Wheaton*, p. 1006; 1 Wharton's *Digest*, § 94.

[2] 1 Calvo, § 571.

denied its advantage. In 1726 the Spanish government forced an entrance into the British embassy at Madrid in order to arrest the duke of Ripperda, the surrender of whom and of his papers had been refused[1]; and in 1747 the Swedish government used such means of annoyance, short of a violent entry, to obtain the possession of Springer, accused of treason, who had taken refuge in the British embassy at Stockholm, that the ambassador surrendered him under protest[2]. His government supported that protest, without effect, and, since no one would now treat common criminals with more indulgence than politica ones, these two cases may be considered to have settled the rule of international law as not allowing an asylum in legations to accused persons of either class. Nevertheless such an asylum is in practice allowed from time to time in Spanish America, and has been given in Europe as late as 1862 in Greece and 1873 in Spain. Humanity has triumphed over the law, and not altogether without approval in the countries concerned, in which the victors do not know but that their turn for availing themselves of foreign hospitality may soon come. The United States have done their best, so far as instructions from Washington may go, to put an end to the practice; but the pressure of circumstances has been too great for either their or the British diplomats, and even consuls, on the spot to resist it. We may hope that the marked improvement which has taken place of late years in the political stability of the states in which asylum has been given will allow the practice to fall into desuetude[3].

In non-political matters, and in political ones where revolution is not so frequent as to be almost a recognised form of opposition, the exterritoriality of the precincts of legations has now in this country only a very limited range of operation. Where a person is not protected from suit by any personal diplomatic immunity, nothing will prevent his being ultimately reached by the territorial jurisdiction, though the convenience of the minister must first be consulted as to the time and mode of effecting an arrest or serving process within the legation premises. In the last resort what was said by Lord Dudley,

[1] Martens, 1 *Causes Célèbres*, 174.

[2] *Ib.*, p. 326.

[3] Hall, § 52, with the notes, is worth consulting.

secretary of state for foreign affairs, in the case of Mr Gallatin's coachman before referred to, will apply: "with respect to the question of the supposed inviolability of the premises occupied by a foreign minister, I am not aware of any instance, since the abolition of sanctuary in England, where it has been held that the premises occupied by an ambassador are entitled to such a privilege by the law of nations." The same view was stated by the court of appeal of Rome in a judgment of 30 August 1899, in which, while denying exterritoriality to the Vatican, the conclusion drawn from it, had it existed for that palace, was thus repelled: "the hotels in which [foreign sovereigns and persons entitled to diplomatic immunities] reside are not the less considered as a part of the national territory, and...penal justice has the right and the means of following criminals, in case of urgent necessity, into the places which enjoy an indirect immunity[1]." But in some countries the inviolability seems to have more vitality. The Institute of International Law resolved that "no agent of the public authority, administrative or judicial, can penetrate into the hotel of a minister for the performance of his functions without the express consent of the minister[2]." If the minister raised undue difficulties, such a rule would necessitate a reference to his government, causing a delay which in some cases might defeat the ends of justice. The question is one in which there is no international agreement that can be opposed to the national law and jurisdiction.

[1] 31 *Journal du D. I. P. et de la J. C.* 215, quoting *Monitore dei Tribunali*, 1900, p. 339.

[2] 14 *Annuaire*, p. 242.

Notes to Chapter XI.

Page 259. Meunier's case is reported [1894] 2 Q. B. 415. The passage quoted from Mr Justice Cave is at p. 419.

Page 262. It may be admitted that a state is entitled to punish a person who has entered into its service for an offence committed anywhere against its service. See von Bar, *das Strafgesetz*, § 48.

Page 266. In 1903 the government of the Netherlands refused the execution against a ship at Flushing, belonging to the Belgian state and employed by it as a trainingship for pilots, of a judgment which had been obtained against that state and had been affirmed by the supreme court at the Hague: *R. de D. I. et de L. C.*, 2me série, t. 6, p. 290.

Page 269. The British patent law will be enforced on board a foreign ship in a British port: *Caldwell* v. *Vanvlissingen*, 9 Hare 415. The contrary has been held in the United States: *Brown* v. *Duchesne*, 19 Howard 183. In consequence of the former decision the st. 15 and 16 Vict., c. 83, s. 26 was passed, and has since been replaced by st. 46 and 47 Vict., c. 57, s. 43; by which enactments a foreign vessel, on condition of reciprocity being allowed, may use a British patent for her navigation within the jurisdiction of the United Kingdom, but not for the manufacture of any thing to be sold or exported from the United Kingdom.

Page 272. That a private ship is not an asylum for political refugees was recognised by France in *Sotelo's case* (Calco, § 1130), and by Lord Aberdeen (*Report of Royal Commission on Fugitive Slaves*, p. 154) as to hired vessels carrying mails, which would not be public ships within our doctrine on p. 265. The United States have varied, probably, as Freeman Snow suggests (*Cases on International Law*, pp. 149—151), on account of the exceptional character of the Spanish American states, as to which see our p. 282.

CHAPTER XII.

DIPLOMACY.

Diplomatic Agents.

States, like other ideal bodies, can only negotiate and contract with one another by agents, except in the case of monarchical states identified with their sovereign rulers; and since in modern methods of government even the most autocratic sovereigns do not personally conduct binding negotiations, the physical necessity of employing agents for the purpose is merely replaced for them by an equally cogent practical necessity[1]. The right of embassy or diplomatic representation which is often said to belong to states is, therefore, not really separable from their right of contracting: the former must exist if the latter does. The minister of foreign affairs of a state is its standing diplomatic agent for business transacted at its court. That a person may be a diplomatic agent for business transacted with and at other courts he must be accredited by the one state

[1] The Holy Alliance, signed by the sovereigns of Russia, Austria and Prussia on 26 September 1815, and to which most of the other European sovereigns acceded, is scarcely an exception to what is here said. It was a vague and mystical statement of the Christian principles by which the monarchs agreed to be guided, and so far was it from containing definite and really binding stipulations that its practical purport (if indeed it had any) can only be gathered from the policy which was afterwards followed by its authors, and which is commonly called from it that of the Holy Alliance. Even such as it was, the Prince Regent of England refused to become a party to it without the signature of a responsible minister, though he stated that he personally agreed with its sentiments, as well he might, so long as all that could be known of them was what appeared in the document.

and received as such by the other; and the purpose of his mission would be defeated or at least its utility impaired if he was not an acceptable person, *persona grata*, to the latter. If the latter state declines to receive him, or objects to the continuance of his mission, on frivolous grounds, it will give just cause of offence to his state, which will protect its dignity and interests by appropriate measures, among which the dismissal of the ambassador or other representative of the offending state is sometimes employed. But however groundless may be the objection taken to an individual he will not be a diplomatic agent unless received as such, nor longer than he continues to be so received, although he will enjoy his immunity from the territorial jurisdiction of that state during a reasonable time while travelling through its territory, both on entering it in order to present his credentials and on leaving it, whether on the termination of his mission or, if the case should arise, after he has been refused reception or dismissed. In the case of negotiators at a congress or conference these rules have to be slightly modified. Those negotiators are not, as such, accredited to the state in which the meeting takes place, although the permanent diplomatic agents at that court are usually included in the representation of their respective states at the meeting. The reciprocal examination of their powers by the members of the congress or conference amounts to a virtual accrediting of them all round, and to a virtual or presumed acceptance of them all round: in a common negotiation between many states it would be very inconvenient that personal objections should be raised by single states. And correspondingly the diplomatic immunities from territorial jurisdiction will attach in favour of all the members of the congress or conference, as well during its sitting as during their reasonable travel to and from the place of meeting through the territories of all the states represented, no one of which can be considered as a third or outside party.

Diplomatic agents are classified in rank and precedence by rules made at the congresses of Vienna (1814) and Aix la Chapelle (1818). The first class consists of ambassadors, among whom were formerly the legates and nuncios of the pope, respectively his special and ordinary resident ambassadors. The pope having lost his temporal power, his legates and nuncios are

no longer ambassadors in the same sense as those of states, but they retain their rank in the first class. The second class consists of envoys and ministers plenipotentiary, the third of ministers resident; and these three classes are accredited to the sovereign monarch or other head of the state. The fourth class is that of *chargés d'affaires*, who are only accredited to the minister of foreign affairs; and these are either *chargés d'affaires ad hoc*, "sent out originally with express credentials as such," or *ad interim*, "promoted temporarily to that position, as members of an embassy or legation, during the absence or inability of their chief[1]." "The classification," as Hall says, "is of little but ceremonial value; the right which ambassadors are alleged to possess, of treating with the sovereign personally, having lost its practical importance under modern methods of government[2]."

Consuls have no diplomatic character[3], nor have commissioners sent for special objects. Among the latter are persons employed in the exercise of the right thus expressed by Earl Russell in his despatch of 26 Nov. 1861 to Mr Adams: "states may lawfully enter into communication with *de facto* governments, to provide for the temporary security of the persons and property of their subjects." Such communications do not amount to a recognition of the *de facto* government as a state, or, if the case be one of a revolution in a state already recognised, to a recognition of the new form of government[4]. But in the latter case, if the communications are carried on through representatives who were accredited to the old authorities, they will retain their diplomatic character and immunities pending the accrediting them to the new ones. Much the commonest employment, however, of commissioners for special objects is unconnected with insurrection or revolution, being for the transaction of administrative business concerning special departments of government, as the post office, or on special occasions, as universal exhibitions.

"Persons carrying official despatches to or from diplomatic agents have the same rights of inviolability and innocent passage

[1] Taylor, § 280.

[2] § 98.

[3] See above, p. 279.

[4] See Geffcken's Heffter, § 222; and above, pp. 50, 59.

that belong to the diplomatic agent himself, provided that their official character be properly authenticated. It is usual to provide this authentication in the form of special passports, stating in precise terms the errand upon which they are engaged[1]."

A few words will not be out of place on consuls, if only to mark more clearly the difference between them and diplomatic agents. Their functions will be understood from the headings of the chapters in the *General Instructions for H. M.'s Consular Officers*, 1893: Mercantile Marine, Trade and Commerce, Quarantine and Cattle Disease, Assistance and Advice to British Subjects, Relief of Distressed British Subjects, Care of Property of British Subjects and of Deceased British Subjects, Passports, Notarial Duties, Marriages[2], Registration of Births and Deaths, Royal Navy, Foreign Navies (of course only to the extent of sending reports and intelligence) and Slave Trade. All the functions thus pointed to are administrative ones in the interest of the consul's state or of its subjects, and the only allusion to the exercise by the consul of any jurisdiction, namely to that over the persons on board a ship of his country in port, in matters purely internal to the ship[3], is so made as not to claim it of right. Thus it is said that "consular officers are not entitled to any rights, privileges, exemptions or immunities, except those defined by treaty and those regulated by local law or custom." And: "the discipline on board a British merchantship while in a foreign port is usually allowed to be regulated by the master in conformity with English law, and it is desirable that he should be supported in maintaining it.

[1] Hall, § 104*.

[2] The celebration of marriages in consulates and legations can only take place when the law of the consul's or diplomatic representative's country allows it. When Great Britain is that country, such law is contained in the Foreign Marriage Act 1892 and the Foreign Marriages Order in Council 1892. And even then it will depend on the doctrines of private international law (see above, p. 249), as understood and practised in each country, what validity the marriage so celebrated will have in countries other than that of the consul or diplomatic representative. No general recognition of the international validity of marriages celebrated in consulates or legations has a place among those doctrines.

[3] See above, pp. 269 and 271, note.

Consular officers should assist shipmasters in this respect, warning them however of any local rules or regulations which might interfere with their freedom of action[1]." Indeed, though the jurisdiction of the ship's master in purely internal matters, exercised as it can be without stepping off her quasi-territorial deck, is a part of received international law, with the principles of which it is in conformity, the same cannot be said of any intervention by the consul, an officer on a foreign shore. Even could it be asserted that such intervention was universally allowed, still the state which was the sovereign of the soil would in the absence of treaty have an imprescriptible right to forbid it. For the rest, a consul cannot enter on the execution of any part of his office until his appointment has received the sanction of the government of the territory, which is usually given by an *exequatur*. When that sanction has been given, as it is a business matter devoid of political significance, it will remain in force without need of renewal if a revolution should bring about a change of government.

The consuls who exercise a large jurisdiction in Turkey, China and other countries of non-European civilisation fall strictly under what has here been said, their special rights and position being always the fruit of treaties, elaborated by a practice which through acquiescence has acquired an authority interpreting the treaties. The system so established is sufficiently uniform to be capable of treatment as a branch of practical international law, but it concerns private interests and could not be usefully treated without much detail. Public interests are only touched so far as consuls in the countries referred to are invested with diplomatic functions, which is often the case, and then the general rules of international law apply. The consuls who exercise British jurisdiction and other authority in colonial protectorates have no connection beyond the name with the consuls spoken of in this section. They do not act in the dominions of a foreign state, but are the exclusive functionaries within the geographical range of their appointment

[1] *General Instructions* &c., pp. 87, 89.

Treaties and other International Contracts.

It is unnecessary here to enter into the general principles of the law of contract: what is important for us is to notice the points in which contracts between states present any exception to those principles or any peculiar application of them. First then the rule that a contract presupposes the free will of the parties, and is void when obtained by force or intimidation, is applicable to any force or intimidation practised on the contracting agent of a state, but not to what is practised on the will of the state itself. If it were not so, no valid treaty of peace could be extorted by a successful war. But the rule that a contract is vitiated by fraud applies, subject to the observation that some latitude must be allowed in negotiating treaties of peace to the right of misleading an adversary which is incident to war. One who while the negotiation continues is still an enemy cannot be expected to abstain from misstatements bearing on his probable means of victory, which he was entitled to employ yesterday, and which if the negotiation fails he may find it necessary to repeat tomorrow. But states at peace are subject as moral beings to the duty of truth, and there are frauds which could not be tolerated even between states at war, such as the production of forged maps on questions of boundary.

The contracts of states are not tied to any form. The essential is that they shall be concluded with the assent of the contracting authority of each party, which is usually the chancellor, minister of foreign affairs, secretary of state or grand vizier, for all of whom foreign minister may be taken as a general expression, although in the United States the senate shares that authority, and occasions may arise in which it is wholly vested in a national assembly. When the contract is drawn up in a formal shape, like that of a deed or notarial act between private persons, it is called a treaty or a convention. The terms are synonymous, and even the usage of calling the more important acts treaties, the less important ones conventions, is far from being uniformly followed. Such an act always needs ratification by the contracting authorities of the parties, whether, as is now usual, that necessity is expressly reserved in the treaty or not. This rule is as old as Vattel, though in the time of

Grotius it was thought that a diplomatic representative bound his constituent by whatever agreement he concluded within the terms of his credentials[1]. The actual rule is equivalent to saying that credentials, however expressed, and notwithstanding the implication of full powers contained in the name plenipotentiary, empower the representative to nothing more than to negotiate and to conclude provisionally. The contracting authorities, of whom only one can in general be present at the court where the treaty is signed, reserve to themselves the power to conclude finally. The ratification may be refused by any party, and although this would be offensive if done without grave reason, it is impossible to limit the right of doing it, and there are sufficient examples of its being done even by foreign ministers who all along had control over the negotiations. Where the contracting authority is shared by a body having no such control, as the senate of the United States, refusal of ratification may result from the exercise of independent judgment and is very natural. Such a body will occasionally attempt to qualify its ratification by a modification of the terms of the treaty, but such a proceeding is nothing more than the proposal of a new treaty which may or may not be accepted. The discussions which take place in congresses or conferences are recorded in protocols, in which it often happens that the representatives of the parties have caused reservations made by them, or interpretations placed by them on the terms adopted, to be entered. The subsequent signature of the resulting treaty will prove that those reservations or interpretations were accepted by the other negotiators, and a simple exchange of ratifications will leave the benefit of them to the party on whose behalf they were made. But if a party attempts to make a reservation or interpretation by its ratification, the case will be the same in principle as that of a ratification in which it is attempted to modify the terms of the treaty, and it will be for the other parties to determine whether they will sanction the attempt by carrying out the exchange of the ratifications.

When the ratifications of a treaty have been exchanged, it operates as to public rights retrospectively from the date of its

[1] Grotius, l. 2, c. 11, § 12: Vattel, l. 2, c. 12, § 156.

signature, which is also that named as the date of the treaty in quoting it; and even before the exchange "stipulations, the execution of which during the interval between signature and ratification has been expressly provided for, must be carried out subject to a claim which the party burdened by them may make, to be placed in his original position or to receive compensation if the treaty be not ratified by the other contracting state[1]." Indeed in treaties of peace, when ratification by no authority which has not been concerned in the negotiation is needed, such an immediate commencement of execution will often be very beneficial. But when such an authority as that referred to has to be called in, private persons can neither act on the assumption that its independent opinion will agree with that of the negotiators, nor can they be expected to suspend their operations. And it has accordingly been held in the United States, with reference to a private transaction which took place while a treaty was before the senate, that "to construe the law so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust and cannot be sanctioned[2]."

Contracts between states are often concluded not in the shape of a treaty or convention, but in that of an exchange of notes, these being usually signed by the foreign minister of the country in which the negotiation is carried on, and by the ambassador of the other country. In such cases the foreign minister of the latter country also has usually been a real party to the negotiation, by his despatches addressed to his ambassador and communicated by him to the other side; and the very terms of the notes to be exchanged have usually been settled in that correspondence. The result therefore is that at which the two contracting authorities have already arrived, and there is no need of ratification, nor is such a formality used. Again, the international agreement may be in the form of a declaration signed by plenipotentiaries assembled in conference, as in the case of the Declaration respecting Maritime Law signed at Paris on 16 April 1856. On that occasion the foreign ministers of all the concurring powers except Russia were among those who

[1] Hall, § 110.

[2] *Haver* v. *Yaker*, 9 Wallace 32.

signed, and Count Orloff, who on the 14th had stated that he must refer to his court before expressing the opinion of the Russian plenipotentiaries, made known on the 16th that he had received the instructions of his court. Another form is that which was employed for the St Petersburg declaration of 11 December 1868, prohibiting the use in war of explosive bullets of less weight than 400 grammes. That document did not issue from a conference, but it recited that the signatories had been authorised by the orders of their governments to make the declaration. In neither of these cases could there be any question of ratification, the concurrence of the highest contracting authorities of the states which were parties being otherwise assured. If any form of international agreement can be imagined in which or as a preliminary to which the assent of the highest contracting authorities has not been assured, it will require, like a treaty, to be ratified in some manner by their subsequent assent.

The interpretation of treaties has been considered at much length by many writers on international law, and rules on it have been suggested which in our opinion are not likely to be of much practical use[1].

The important point is to get at the real intention of the parties, and that enquiry is not to be shackled by any rule of interpretation which may exist in a particular national jurisprudence but is not generally accepted in the civilised world. On the whole we incline to think that the interpretation of international contracts is and ought to be less literal than that usually given in English courts of law to private contracts and acts of parliament. In the first place, English drafting is more minutely careful, and correspondingly English interpretation is more literal, than is common in those countries to which most of the ministers and diplomats who are responsible for the wording of international contracts belong. And secondly, the nature of the matters dealt with by those eminent functionaries, and the peculiar conditions under which they work, must be considered. A style of drafting accommodated to the expectation of a very literal interpretation would necessitate the suggestion

[1] Hall, §§ 111–113, is copious on this subject, and his discussion of it and the cases to which he refers afford much matter for reflection.

and discussion of so many possible contingencies, as would be likely to cause needless friction between the representatives of countries not always very amicable. It seems best in the interest of peace that, when an agreement on broad lines has been reached, it should be expressed in language not striving to hide a felt doubt, but on the other hand not meticulously seeking occasions for doubt; and to such a style of drafting, which we believe to be that most common in treaties, a large and liberal spirit of interpretation will reasonably correspond. Perhaps no better instance can be given of the difference between the two modes of interpretation which we have in mind than this. State A has concluded with state B a treaty on tariffs containing what is known as the most favoured nation clause, promising to B the benefit of lower duties conceded to any other state. A then concludes with state C a treaty which, for some valuable consideration, concedes to it lower duties on certain articles than are provided in the treaty with B. Can B demand the admission of its goods at the same rates of duty as those of C? On a literal system of interpretation it can, but on the broader system it cannot, unless the case admits of its giving to A the same consideration that is given by C, and it is willing to do so. The latter answer has been made by the Supreme Court of the United States[1], and in our opinion justly.

The classification of treaties has exercised many writers on international law no less than their interpretation, but the only class to which it seems necessary here to refer is that of transitory or dispositive treaties, which have already been mentioned in connection with the continuity of states through changes of territory[2], but of which a larger view must now be taken. The dispositive character of a treaty may be shown by its vesting rights in individuals as well as by imposing a servitude on territory; and the rights so vested will continue to exist notwithstanding the outbreak of war between the states which made the arrangement, and notwithstanding the transfer of the population enjoying the rights to another sovereignty by conquest or cession. Thus the right which was reciprocally given by the treaty of 1783 to the then owners of land in the

[1] *Whitney* v. *Robertson*, 124 U.S. 190. [2] See above, p. 60.

United States and the British dominions and their successors in title, to enjoy such ownership notwithstanding their being aliens, was not destroyed by the outbreak of war between the two countries in 1812[1]. And we may go a step further, and detect something of the dispositive character in a treaty which vests no right in individuals, but establishes between two states a condition of things intended to be permanent and by which the rights of individuals are affected; for example, by providing for the execution in either country of the judgments of the courts of law of the other country. The mutual rights of the two states are disposed of—a line of demarcation is drawn between the bodies of rights with which they are respectively equipped—and although the outbreak of war between them may interpose practical obstacles to the observation of the line, on the conclusion of peace, if the treaty of peace be silent on the subject, each will reenter on the enjoyment of what may be called the ideal territory assigned to it by the old treaty just as it will reenter on the enjoyment of its physical territory. But, since the dispositive character in such cases operates primarily between the states, the population of a district of which the sovereignty is transferred by conquest or cession will live for the future, as we have seen, under the system which such dispositions have created for the state to which they are annexed, and not under that which existed for their former state[2].

The Obsolescence of Treaties.

Almost all theorists agree that to many treaties the tacit condition *rebus sic stantibus* is attached: they were concluded in and by reason of special circumstances, and when those circumstances disappear there arises a right to have them rescinded. If then, it is argued, the party for whose advantage such a treaty was concluded is inequitably obdurate, the party burdened by it will be justified in treating it as obsolete. Mr Hall, while

[1] *Sutton* v. *Sutton,* 1 R. and M. 663; *Society for the Propagation of the Gospel* v. *New Haven,* 8 Wheaton 464.

[2] As to the effect of the establishment of the German empire on the treaties between the United States and the states included in that empire, see *Terlinden* v. *Ames,* 184 U.S. 270—an extradition case.

reprobating "the growing laxity which is apparent in the conduct of many governments, and the curious tolerance with which gross violations of faith are regarded by public opinion," lays down what he calls "a clear principle" on the subject; and if we cannot subscribe to its clearness, we will give it in order to show how far clearness is attainable. "Neither party to a contract," he says, "can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into, and on the other hand a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered[1]." But the question only arises when there is a difference as to what conditions were implied, or were contemplated, not as existent or possible, but as essential. Evidently the right of denouncing a treaty is an imperfect one, demanding for its perfection in any case better definition than in the present state of international law is attainable, but not therefore to be condemned *in toto*, only to be exercised with a grave sense of moral responsibility[2].

Conspicuous among treaties doomed by their nature to obsolescence are those by which a state defeated in war is obliged to abstain from fortifying or otherwise making free use of some part of its territory, when the restriction is not imposed as forming part of a system of permanent neutrality. Art. 3 of the treaty of Paris of 20 November 1815 prohibited the fortification of Huningen by France, not as a part of the neutrality of Switzerland but in order to relieve the city of Bâle from anxiety; and immediately on the revolution of 1848 the French provisional government declared that article to be no longer binding. By art. 11 of the treaty of Paris of 1856 the Black Sea was interdicted to the flags of all powers, with the exception of certain light vessels necessary for the service of the coast and of the mouths of the Danube; and by art. 13 Russia and Turkey engaged not to establish or maintain any military marine arsenal on its coast; but neither Russia nor Turkey was subjected to permanent neutrality. Russia took advantage of the Franco-

[1] § 116.

[2] *Hooper* v. *United States*, quoted in Scott's *Cases on International Law* from 22 *Court of Claims* 408, 416, may be referred to.

German war of 1870 to denounce those stipulations, and they were abrogated by the treaty of London of 13 March 1871, after lip homage had been paid at a conference to the continuing force of treaties not abrogated by the consent of the parties to them. The reader must exercise his own opinion as to the justification in these cases, but he will notice the difference between them and the declaration in art. 92 of the Final Act of the congress of Vienna in 1815, that a certain part of Savoy belonging to the king of Sardinia "shall make part of the neutrality of Switzerland, such as it is recognised and guaranteed by the powers," as well as the provision in art. 3 of the treaty of Paris of 20 November 1815 that "the neutrality of Switzerland shall be extended to the territory" there defined. By these articles a servitude or easement was created in certain districts of Savoy, as a part of a system of permanent neutrality created for the benefit of all Europe, and a power affected by that servitude can no more by its own mere determination put an end to what is recognised as a part of the system than it could to the whole.

We shall have to return to the subject in connection with the political action of states.

Notes to Chapter XII.

Page 294. On the operation of a most favoured nation clause, see an article by Chester Lloyd Jones, Ph.D., in the *Annals of the American Academy of Political and Social Science*, vol. 32, pp. 119—129.

Pages 294, 295. See the effect of war on treaties more fully considered in the author's volume on *International Law, Part II, War*, pp. 29—32. Further reflection has confirmed us in the opinion that the abrogation of treaties by war is preferable, as a generalization, to their suspension. In either form the rule will have exceptions, but these seem to be less numerous, and to be more susceptible of being comprised in general statements, if abrogation be taken as the standard. Also that form is probably better adapted to compel the negotiators of a peace to pay attention to the question, and, which is much to be desired, to express distinctly what are the treaty obligations between the parties which they desire to be renewed. Again, if by an oversight a treaty which both parties desire to continue should not be mentioned, and should therefore lapse under the rule of abrogation, it will be easy for them to renew it. But if a treaty which only one party desires to continue should be overlooked, and should therefore continue under the rule of suspension, the consequence might be onerous to the party desiring relief from that treaty, and might even endanger the duration of the peace.

It may serve to clear our ideas with regard to the dispositive character by which a treaty not mentioned at a peace will still escape abrogation by the war, if we remember that the subjects of the belligerents are now to resume the intimate intercourse which forms part of the daily life of the world, and that they will expect to resume it under all the guarantees on which that daily life was based before the war. Hence all that concerns private law and the administration of justice will possess in an eminent degree the dispositive character ensuring permanence. This is exemplified by the treaty of 1760 between France and Sardinia, relative to the execution in either country of judgments rendered by the courts of law of the other country, and

by the conventions which have resulted from the conferences on private international law at the Hague, from which Great Britain has unhappily held aloof. Similarly the treaties between Turkey and the Christian powers, which are an essential element of the administration of justice in Turkey to the subjects of the latter, cannot be abrogated by war, as the Ottoman porte claimed that so far as Greece was concerned they had been by the war of that year. That claim was rejected by the Great Powers, which intervened in the negotiations for peace, on the ground that the privileges and immunities of the Greeks in Turkey were a part of the arrangements which they imposed when the independence of Greece was established in 1830. But the arguments applicable to the capitulations as treaties could not properly be extended to the encroachments on their letter which are included in the system as practised, and Art. 3 of the treaty of peace affirmed the maintenance of the capitulations but stipulated the conclusion of special arrangements to prevent their abuse, which by Art. 5 Turkey and Greece were within three months to embody in a consular convention. See 5 *Revue Générale de Droit International Public* 154—159.

In the volume on *War*—p. 31, note—we have suggested that the stipulation of a servitude in favour of the subjects of a belligerent, to be enjoyed in the territory or territorial waters of the other belligerent, is not one that should be deemed to revive after a peace which does not mention it. The exercise of such a servitude is not a part of the daily life which revives of itself when war is over, but consists in a series of acts on the part of foreigners, bringing them into relations with the population from which friction dangerous to the conservation of amity may easily result. It would be rash to adopt a rule assuming that such relations will be safe in the state of feeling likely to exist between the peoples concerned on the morrow of a war, while, if in any case the parties deem that such relations will be safe and desire their existence, they can preserve the servitude by the treaty of peace, or renew it afterwards if it is then overlooked.

CHAPTER XIII.

THE POLITICAL ACTION OF STATES.

Legal and Political Claims distinguished.

We have now considered independent states as possessing sovereignty over territories and subjects, and have traced rules for their conduct in the relations which would arise out of that character even if they carefully restricted themselves to it. Those rules however could not always be reached by deductive reasoning, because the sovereignties of different states must clash so long as their subjects do not confine their travels and their activities within their respective territories. A large portion of authority concerning foreign persons and things is allowed to the internal jurisdiction of states, and in the second part of this work we shall find other considerations coming in with regard to war and neutrality, the total result being the establishment, through the joint effect of reason and custom, of a *modus vivendi* between states. A claim which a state may make on another for a breach of that *modus vivendi*, alleged to have been committed by the latter against the former or one of its subjects, resembles in important respects the claims which the subjects of any state make against one another in its national courts of justice. There is the same reference to recognised rules as the test; we meet in both cases, as we must whenever human action is concerned, with property, contract and tort; the notion of property is further introduced into the claims of states by the analogy which territorial sovereignty has to it; much of the reasoning by which the rules are established, and all the reasoning by which the claims of states on any occasion

are asserted or denied to result from them, is rather juridical than political. These then may be called the legal claims of states, and if we were discoursing of international affairs to an inhabitant of another planet he might suppose that when we had explained them we had covered the whole ground. He might ask what more there was to say than that the independence of states precludes any interference by one of them with another, on any ground other than that of a rule forming part of their *modus vivendi*. But we who have to do with men as they are on the earth know that a large part of the action of states on one another is not confined within those legal limits, but is of the kind known as political action. What then is its relation to international law?

We have already referred to three classes of cases in which political action is justifiable[1]. One is that in which no rule meeting the circumstances has been sanctioned by the consent of the international society. We do not mean only that there is no recognised rule for guiding action in the circumstances, but also that there is no general opinion condemning action in them; for such an opinion, if it existed, would be equivalent to a rule in favour of the state of things which must continue if action is not taken. A second class is that in which opinion is felt to be outgrowing a rule, so that a change in the law may be asserted in good conscience to be necessary, and yet, from the want of an international legislature, it is difficult to effect such change otherwise than by setting the example of it. And the third is that of an imperfect right, given by general opinion, although there is no international organ capable of defining the circumstances for its existence with the precision necessary for a rule. We have met with examples in the navigation of international rivers, extradition and the obsolescence of treaties; and it must be observed of this class that the complexity and variety of circumstances would often make it impossible, even if an international organ existed, that it should pronounce its judgment in the form of a rule. These three classes correspond to the cases arising in the internal affairs of a state in which the action of the legislature is required to supplement, to amend or to define

[1] See above, pp. 18, 156.

those rules of law which the judicature has to apply, or to give relief in particular cases where sufficient definition is impossible. Action in them by a state is political just as the action of a legislature is political. It stands towards international law, considered as a body of rules, that is as positive, very much as the action of parliament stands towards the law of the land. If the action is taken not by a single state but by a congress, the analogy is as close as it can be, having regard to the different conditions under which law exists among states having no common government. Till "the parliament of man" becomes a fact, states have to do for themselves what parliaments do for individuals. Of course in doing it a state or a congress is bound, like a legislature, to respect the principles of distributive justice; to be sure that all its action, if only on the fringe or borderland of law, is within the domain of right[1] (*droit*).

The cases in which the positive law of nations needs to be supplemented, amended or precisely defined, in order to bring it into conformity with justice or right, or in which justice or right direct that particular relief from the positive law should be allowed, appear to cover between them all the admissible political claims of states, as distinguished from their legal claims arising out of a positive *modus vivendi*. But the subject may be presented from different points of view, and, as exhibiting a view of it which we believe to be substantially the same as ours, we draw particular attention to the memoranda which were distributed by the Russian delegates to the members of the Hague conference in 1899, explanatory of Articles 5 and 10 of the Russian draft of a convention on international mediation and arbitration[2]. The distinction between the legal and political claims of states is there put forward as corresponding to the distinction between those which admit and those which do not admit of being made the subject of compulsory arbitration, that is, of treaties being concluded by which states should bind themselves to refer them to arbitration, while it is admitted that both are proper occasions for mediation. The contrast is represented as being one between conflicts of rights and of

[1] See above, pp. 9—11.

[2] Bluebook C. 9534, *Correspondence respecting the Peace Conference at the Hague in* 1899, pp. 39—45.

interests. The former conflicts are described as questions of a secondary order, and as having for their characteristic that a state claims from another a material indemnity for damage or loss caused to itself or its subjects by acts of the defendant state or its subjects which it judges not to be in accordance with law; and it is pointed out that questions of this class rarely cause war. The latter are described as touching the national honour of the state, or its superior or vital interests and its imprescriptible assets, and as having for their characteristic that a state claims from another that it shall exercise or abstain from exercising certain determinate attributes of sovereign power, that it shall do or not do certain determinate acts not touching material interests[1]; and it is pointed out that on such questions depend in a large part the security and prosperity of the state, and that only the sovereign power can be the judge of them. As examples of the former or legal class of claims and of arbitrations to which they have been referred are given "violation of the duties of neutrality (affairs of the General Armstrong, 1851, and of the Alabama, 1872), violation of the rights of neutral states (blockade of Portendik, 1843, &c.), unlawful arrest of a foreign subject (affairs of Captain White, 1864, of Dundonald, 1873, &c.), loss caused to a foreign subject by the fault of a state (Butterfield affair, 1888; conflict between Mexico and the United States, 1872; &c.), the seizure on *terra firma* of the private property of a belligerent (affair of the Macedonian), illegal seizure of ships (seizure of the Veloz, Victoria and Vigie, 1852; affair of the Phare, 1879; and others), violation of fishery rights (affair of the Newfoundland fisheries, 1877, &c.)." And it is added: "obviously in the exceptional cases in which the pecuniary interest at stake has an importance of the first order from the point of view of the interests of the state, for instance when the question is about the bankruptcy of a state, a power which appeals to its national honour or its vital interests will be able

[1] Particular material interests are intended, such as might occasion legal claims: general material interests are of course included in the prosperity of the state, which is said largely to depend on these questions. *Biens imprescriptibles* include moral as well as material possessions, in which sense the term "assets" has lately come into use: we employ it, but with an apology, since the term "possessions" has too material a sound.

to decline arbitration as the means of determining the conflict."

The questions arising from the obsolescence of treaties are classed by the memoranda among political ones. "The reciprocal rights and obligations of states," it is said, "are determined in a notable measure by the body of what are called political treaties, which are nothing else than the temporary expression of fortuitous and transitory relations between the different national forces. These treaties bind the freedom of action of the parties so long as the political conditions which produced them remain without change. When these change, the rights and obligations resulting from the treaties necessarily change also. It may be said generally that the conflicts which arise on political treaties turn in most cases not so much on a difference in the interpretation of what the treaty lays down as on the changes to be made in its provisions or on its complete abrogation. Consequently the powers which take an active part in the political life of Europe cannot submit conflicts arising on political treaties to a court of arbitration, in the eyes of which what is laid down by the treaty would be as binding and inviolable as what is laid down by the positive law is in the eyes of a national court of justice[1]."

Indeed the distinction which we are considering is generally made the basis of treaties by which states bind themselves to refer certain classes of differences to arbitration, or provide the machinery for international arbitration. In the Hague Convention for the Pacific Settlement of International Disputes, Art. 16, it is said that "in questions of a legal nature [*d'ordre juridique*], and especially in the interpretation or application of international conventions, arbitration is recognised by the signatory powers as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle." Since that convention did not include an obligation to resort to arbitration, it could easily recommend a class of cases as suitable

[1] In an article on International Arbitration, in the *International Journal of Ethics* for October 1896 (vol. 7, pp. 1—20), reprinted as an appendix to this volume, we distinguished between legal and political differences between states, and pointed out the bearing of the distinction on their general suitableness for arbitration.

for that remedy without declaring them to be the sole class. But when an obligation is contemplated the usual course is to exclude the cases to which it is not to apply, and so not the legal but the political class of differences is brought into prominence. Thus in the Anglo-French treaty of 14 October 1903 the condition for submission to arbitration is expressed as being that the differences "do not involve either the vital interests or the independence or honour of the two contracting states, and that they do not affect the interests of a third power." And the plan of general arbitration which at the Pan-American congress of 1890 received the votes of sixteen of the nineteen American republics, including the United States, the three wanting being Chile, Uruguay and San Domingo, laid down that "the sole questions excepted are those which, in the judgment of any one of the nations involved in the controversy, may imperil its independence." Of course independence is such a vital interest and imprescriptible asset as the Russian memoranda mention, and on the other hand its notion brings in a reference to justice, by which we have pointed out that political claims transcending legal ones are constituted and limited. For the independence of a state is encroached on, not only when its separate existence is at stake, but whenever it is hindered in doing or not doing any thing that an independent state may justly do or abstain from doing. Thus the different points of view from which the distinction between legal and political claims has been presented in this section are in essential agreement.

That distinction is not *eo nomine* one of old standing in the theoretical treatment of international law. It has been brought into prominence under the nomenclature of legal or juridical and political by the discussions and negotiations on arbitration, which is essentially a juridical proceeding, although in the case of claims of the juridical class the practice by states of arbitration for their settlement is so old and frequent that their peculiarity could not fail to attract notice in one form or another. That there are grave practical difficulties in the way of extending beyond them any binding agreement to submit to arbitration is plain enough, as we have shown in the essay forming the appendix, but even a case of political difference

may sometimes happen in which states may reasonably, of their free determination, take that method of attaining the peace which is promised to men of good will. That however is rather a question of statesmanship than of the science of international law. It is enough here to urge that while that science, in accordance with the general opinion of the world as shown by the limitations in arbitration treaties, does not always preclude action on claims not given by positive law being taken on independent responsibility, such action ought always to be preceded by the most scrupulous examination of the justification for it.

The Alleged Inherent Rights of States.

The common classification of the rights of states has been into those which are inherent in them and therefore absolute, and those which arise to them from express or tacit convention and from contract. I will quote the language in which it is described by Rivier, one of the most accomplished jurists who have employed themselves on international law.

"These rights of self-preservation (*conservation*), respect, independence and mutual trade, which can all be carried back to a single right of self-preservation, are founded on the very notion of the state as a person of the law of nations. They form the general statute (*loi*) of the law (*droit*) of nations, and the common constitution of our political civilisation. The recognition of a state in the quality of a subject of the law of nations implies *ipso jure* the recognition of its legitimate possession of those rights. They are called the essential, or fundamental, primordial, absolute, permanent rights, in opposition to those arising from express or tacit conventions, which are sometimes described as hypothetical or conditional, relative, accidental rights. The authorities differ in referring to one or another of them the legal rights (*facultés*) which are their manifestations. Those differences are scarcely more than external; there is agreement at bottom. Every act which violates an essential right is a breach of the law of nations, an international crime or misdemeanour. The state injured has the right to demand reparation and satisfaction, and to compel the offending or responsible state to give it[1]."

Evidently the conditional or relative rights of this quotation are those comprising what we have described as the *modus vivendi* between states, from which legal claims spring, and the

[1] Rivier, *Principes du Droit des Gens*, t. 1, p. 257.

essential or absolute rights serve the purpose of the political claims of states, in justifying in certain cases action which the strict legal rules entering into the *modus vivendi* would not authorise or would even condemn. But it may be questioned whether rights so inherent in a state that they are founded on its very notion can properly be admitted.

Natural persons may have inherent rights, that is, rights to be ordinarily enjoyed within the definition given to them by the law of the land, but which are so sacred as in extreme cases to warrant revolutionary resistance if that law does not adequately recognise them. The right of association is one of them, but it is one over which the laws of all countries find it necessary to exercise a very real control, so much greater is the power of an association for evil than that of its individual members. But states are nothing more than associations of natural persons, acting too outside the salutary control of national law. Surely then the natural right of association is pushed to an intolerable extent when men are deemed to be empowered by it to give absolute rights to their creations in the international world; for instance, to give to a state an absolute right of self-preservation, in circumstances analogous to those which would justify a well ordered state in dissolving an association which had been erected within it. Surely also it is a logical error to assume, because states are moral persons and therefore capable of rights equally with natural individuals, that they must have the same rights as natural individuals.

Again, the doctrine of absolute rights threatens to lead to no practical result for states, as it would lead to none for men if there was not the law of the land over them to measure their rights in all ordinary cases. Wolff, to whom more than to any one else international law is indebted for that doctrine, taught that states have a right to those things by means of which they may avert their destruction and what tends to it, or without which they cannot perfect themselves or avoid what tends to their imperfection. But what two states deem that they require in order to avert their destruction or to promote their perfection may be incompatible, and then the doctrine gives only a clashing of equal rights. To meet this Wolff taught that every nation is free, and that by virtue of natural liberty every one must be allowed

to be the judge of his own actions, so that the right of a nation to what other nations naturally owe it is one which it must not enforce against the will of the latter. That view might receive support from what Thomasius had taught not long before, that the only duties which can be enforced consistently with justice are those which arise from the maxim "do not to others what you would not wish them to do to you," in other words, that negative duties alone belong to justice, affirmative ones being permanently relegated to the domain of morals[1]. But it would prohibit all political action by states, and while it is needless to say that it has not been carried out in practice, it must be added that most of those writers who admit absolute state rights have not even in theory adopted Wolff's negative conclusions, but have laboured to reconcile their doctrine with positive results by various unsatisfactory methods, one being that of a further plunge into the arbitrary in order to establish a hierarchical order of rights, indicating which must give way in the event of their clashing. That system reaches its climax when the right of self-preservation is made to swallow up all the others, as is done by Bonfils and Rivier. *Le droit de conservation*, the latter says, *est le premier des droits essentiels; il les résume tous.* And he goes on to quote from Bonfils: *en réalité il n'y a pour les états, personnes naturelles et nécessaires, qu'un seul droit primordial, un seul droit fondamental, le droit à l'existence*[2]. This, as well as the prominence given in practice to the plea of self-preservation as the warrant for political action, justifiable and unjustifiable, will oblige us to consider that alleged inherent right in some detail.

In the mean time a further observation must be made on the doctrine of inherent rights. Distributive justice, which is practically equivalent to the natural law of certain philosophical schools, is the only source from which rights other than legal ones can be derived either to individual men or to states[3]. In

[1] Wolff, *Jus gentium methodo scientifica pertractatum* (1749), §§ 32, 34, 37, 157, 158. As to Thomasius (1705) see Lorimer's *Institutes of International Law*, book 1, chap. XI.

[2] Rivier, u.s., quoting Bonfils 241.

[3] *Justitia expletrix* maintains men or states in the enjoyment of those legal rights (*facultates*) which belong to them under the distribution of

states which have attained the European standard and form of civilisation the nature of individual men is so fixed that certain decrees of justice about them may also be regarded as fixed, for instance, that which excludes slavery except as the punishment of crime. Hence there may be inherent rights, as that to personal freedom. But the nature of states has varied in historical times, and may again vary. The evolution of society proceeds much faster than the evolution of man. Hence inherent rights of states, could they be admitted, would have but a relative degree of fixity. And indeed we find that while the old writers on natural law contemplated their results as being applicable to all independent human groups, by the very fact of their having no common superior, the tendency now is to treat international law as being relative to what is called "the modern state." Perhaps however that state is not fixed enough to make it wise to endow it with inherent rights, instead of working out each problem which concerns it on its particular merits.

The Alleged Inherent Right of Self-Preservation.

The objections which we have urged against the general doctrine of the inherent rights of states must now be followed by an examination of the one of those rights which is recognised on all hands as being the most important, that of self-preservation. We will take the account of what we oppose from Rivier, *honoris causa*, and especially because of his authority in Roman law, the doctrine of which with regard to individuals has been made a foundation for what is asserted in the case of states.

"When," Rivier says, "a conflict arises between the right of self-preservation of a state and the duty of that state to respect the right of another, the right of self-preservation overrides the duty. *Primum vivere.* A man may be free to sacrifice himself. It is never permitted to a government to sacrifice the state of which the destinies are confided to it. The government is then authorised, and even in certain circumstances

such rights existing in the society of which they form part. Distributive justice (*attributrix*) regulates that distribution. Its province lies *de lege ferenda*, or, occasionally, in pointing out that in a particular case relief ought to be given from the operation of a legal rule which it would be inconvenient to modify generally.

bound, to violate the right of another country for the safety (*salut*) of its own. That is the excuse of necessity, an application of the reason of state. It is a legitimate excuse[1]."

We will here pause to remark that an argument which may be good as between a state and a government entrusted by it with its destinies is not necessarily good between it and that government together and another state; or we may put it that no state can entrust its government with wider powers than itself possesses. But Rivier adds:

"The excuse of necessity has always been allowed to private persons; *a fortiori* it will not be refused to states.—Ulpian, l. 29, § 3, *Ad legem Aquiliam*, 9, 2: *Item Labeo scribit si, cum vi ventorum navis impulsa esset in funes anchorarum alterius et nautæ funes præcidissent, si nullo alio modo nisi præcisis funibus explicare se potuit, nullam actionem dandam.* The same, l. 49, § 1, same title[2]."

In the case so put by Labeo there seems to have been an accidental physical entanglement of two ships which had to be ended in one way or another, but the cases in which the right of self-preservation is invoked to justify the political action of a state are those in which action clearly aggressive in its external character, and not demanded by any physical necessity, is asserted to fall in its intrinsic character within that right. There, whatever may have been the Roman law, British law does not permit a man to ward off danger from himself by transferring it to an innocent person. If he has preserved himself by action externally aggressive against another, he cannot justify his action as intrinsically defensive unless the person against whom it was directed was in fault towards him. Thus it has been held in England that, when a shipwrecked crew is in danger of starvation, it is not lawful for them to kill and eat one of their number, however pressing the necessity[3]. And it has been held in Scotland that a ship, in harbour during a gale and in want of

[1] *Principes du Droit des Gens*, t. 1, p. 277.

[2] *Ib.*, p. 278.

[3] *Queen* v. *Dudley and Stephens*, 14 Q.B.D. 273; decided unanimously by Lord Chief Justice Coleridge, Justices Grove and Denman, and Barons Pollock and Huddleston. Their lordships stated that they had Justice Stephen's authority for repudiating an inference in favour of the contrary opinion which had been drawn from some passages in his writings: p. 286.

searoom, may not cut the ropes of another ship and send her adrift even though it is her only means of escape, but must pay compensation[1]. Liability to suffer hurt, whether in person, in property or in rights, and whether by sentence of law or by private action which the law permits, presupposes a duty violated by the person who is to suffer it. When a small injury is inflicted in obedience to an almost irresistible impulse, the law may overlook it, but in principle we may not hurt another or infringe his rights, even for our self-preservation, when he has not failed in any duty towards us.

Self-preservation, when carried beyond this point, is a natural impulse, an effect of the laws to which human nature is subject in the stage of advancement to which it has yet attained. But the office of jural law is not to register and consecrate the effects of the laws of nature, but to control them by the introduction of the principle of justice, where an unreflecting submission to the tendencies which in their untamed state they promote would be destructive of society. In that way human nature itself has been gradually improved, and we may hope will continue to be so; but the contrast between, on the one hand, the generalisations which express whatever with regard to self-preservation may be its actual condition from time to time, and on the other hand the rules to be enforced by government on the same subject, furnish an instructive instance of the difference, too often overlooked, between the laws of nature, which are the generalised expression of what is, and jural laws, which lay down what is to be done[2]. In the case of a state the impulse or tendency which justice must control is not even that which arises spontaneously on the appearance of danger to natural life or individual welfare, but that which arises from the secondary attachment formed to human institutions. No doubt the state is of all human institutions that to which attachment is the most elevating to the emotions and the moral sentiments, especially when, as is the case of most states, its origin is so remote that the steps which have led up to it are forgotten, and it

[1] *Currie* v. *Allan*, 31 *Scottish Law Reporter* 814. See the article on that case in 6 *Juridical Review* 354—361, in which Mr W. Galbraith Miller criticises the common view of the Roman law.

[2] See above, p. 5.

wears the semblance of being a mould appointed by superior power for the feelings of its members to take shape from. Then those feelings, directed towards it, come nearest to pure altruism, having the smallest ingredient of satisfaction for ourselves or in our own work. But even then, although as a general rule we must admit the truth of Wolff's principle, that a state ought to preserve and perfect itself as an association of its citizens in order to promote their common good, patriotism should not allow us to forget that even our own good, and still less that of the world, does not always and imperatively require the maintenance of our state[1], still less its maintenance in its actual limits and with undiminished resources. The first interest of a society, national or international, is justice; and justice is violated when any state which has not failed in its duty is subjected to aggression intended for the preservation or perfection of another.

The True International Right of Self-Preservation.

What we take to be pointed out by justice as the true international right of self-preservation is merely that of self-defence. A state may defend itself, by preventive means if in its conscientious judgment necessary, against attack by another state, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended. In so doing it will be acting in a manner intrinsically defensive even though externally aggressive. In attack we include all violation of the legal rights of itself or of its subjects, whether by the offending state or by its subjects without due repression

[1] Rivier gets a glimpse of this. *Un état peut-il perdre son droit à l'existence, en être déclaré déchu? C'est à quoi s'exposerait sans doute celui qui violerait d'une manière persistante les règles du droit des gens, qui agirait contrairement à toute bonne foi, à toute humanité; il se mettrait ainsi hors du droit des gens, hors la loi internationale.* Immediately however he seems to set up again the absolute right to existence, by asking *mais qui sera juge? Principes du Droit des Gens*, t. 1, p. 256. If such a case arose, as it may arise with regard to Turkey, the states called on by the circumstances to deal with it must in the present imperfect organisation of the world be the judges of their own political action, as the Great Powers were in 1815, when they justly determined to exclude Napoleon from the throne of France, whatever other government France might give herself.

by it, or ample compensation when the nature of the case admits compensation. And by due repression we intend such as will effectually prevent all but trifling injuries (*de minimis non curat lex*), even though the want of such repression may arise from the powerlessness of the government in question. The conscientious judgment of the state acting on the right thus allowed must necessarily stand in the place of authoritative sanction, so long as the present imperfect organisation of the world continues. If its legal rights or those of its subjects are concerned, and the necessity is not great and immediate, action on the right of self-preservation will seldom be conscientious unless arbitration has first been offered and refused; and there may be cases of a political kind not wholly unfitted for arbitration.

In illustration of this doctrine we will first refer to our section on *Self-Defence on the open sea in time of Peace*[1], in which some cases of preventive action on behalf of legal rights are discussed. Another illustrative case is that of the Caroline in 1838. A large body of Canadian insurgents and United States sympathisers had collected in the state of New York, where they obtained small arms and twelve guns by force from an arsenal, fired shots across the river Niagara into British territory, and were preparing to employ the steamer Caroline for their own crossing. Thereupon a British force boarded her while at her moorings on the New York side, and sent her adrift down the falls of Niagara. The United States complained of the violation of territory, and said that it lay on England "to show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation...also that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it." This was good law, except as to the emergency's leaving no moment for deliberation, which seems to imply, but perhaps was not intended to imply, that the act was one which deliberation would condemn.

[1] Above, pp. 167—172.

Choice of means there was not, for the United States government, even had there been time for applying to it, had already shown itself powerless, and a regiment of militia was looking on at the moment without attempting to interfere with the raiders. The British government justified the acts of its authorities, at the same time recognising the formal inviolability of foreign territory by expressing its regret, and the incident was allowed to drop. As Hall points out, it was better for the United States themselves that the formal violation should occur, than that the lawlessness existing in their territory should be suffered to produce consequences for which they might have been held responsible[1].

Examples of the same character as the seizure of the Caroline have been given by the United States. In 1817 adventurers, acting in the name of the insurgent Spanish colonies of Buenos Ayres and Venezuela, established themselves on Amelia Island in Florida, then belonging to Spain but very near the boundary of Georgia, and in the language of Mr Adams, United States secretary of state, "assumed an attitude too pernicious to the peace and prosperity of this union and of its citizens to be tolerated." The Spanish authorities made "a

[1] In 1840 McLeod, a British subject, was arrested in the state of New York and tried for the share which he had taken in the destruction of the Caroline, but was acquitted on an *alibi*, the state courts having held that the adoption of his acts by the British government as acts of state was no defence before them. The federal government, on which a demand for McLeod's release had been made by Great Britain, agreed in repudiating that view of the law, and an act of congress (29 August 1842) was passed, giving jurisdiction of such cases to the federal courts. The question whether a foreigner is answerable to the local jurisdiction for acts done under the authority of his state, in the course of an invasion in time of war, would have been liable to too plain a negative to be raised; and since the authority of the state is the ground of the immunity there is no reason to distinguish, for this purpose, a violation in time of peace for self-defence from a warlike invasion. But in *The Commonwealth of Massachusetts* v. *Blodgett*, 12 Metcalf 56, Scott's *Cases on International Law* 308, it was decided that the order of a Rhode Island military officer, which the Governor of that state expressly refused to adopt, would not exempt the military inferior obeying it from the jurisdiction of the state of Massachusetts for the violation of its territory. The reasoning comprehended the case of two independent states, and appears to have been just.

feeble and ineffectual attempt to recover possession of the island," and the United States forces then occupied it by direction of President Monroe[1]. In 1818, Spain failing to restrain the Seminole Indians of Florida from incursions into the United States, the same president authorised General Jackson to occupy the Spanish post of St Mark's, in the heart of the Indian country, with orders to deliver it up to its rightful owners "on the arrival of a competent force to defend it against those savages and their associates[2]."

Perhaps the most memorable instance of political action on the ground of self-preservation, justifiable in our opinion, is that of the seizure of the Danish fleet by England in 1807. After the treaty of Tilsit there was good reason for believing that Napoleon and the czar Alexander, in order to obtain a great increase of naval power against England, intended to compel Denmark, by force if necessary, to join them in the war. The British government demanded of Denmark the surrender of her fleet, offering the most solemn pledge that on the conclusion of a general peace it should be restored in the same condition and state of equipment as when received. And on meeting with a refusal it caused the fleet to be captured by force of arms. Such a case is essentially similar to that of a belligerent having sure information that his enemy, in order to obtain a strategic advantage, is about to march an army across the territory of a neutral clearly too weak to resist, in which circumstances it would be impossible to deny him the right of anticipating the blow on the neutral territory. The principle that the legal rights of a state are not to be violated without its own fault is

[1] 1 Wharton's *Digest*, § 50 a.

[2] *Ib.*, § 50 b. In the same volume, § 50 e, will be found information relating to the raids of Mexican Indians and wandering Mexicans on United States territory, which the United States authorities were unable to suppress without pursuing the offenders across the frontier, passing for vast distances through wild country, which they claimed the right to do and to punish the offenders where found. Mexico does not seem to have seriously objected, and conventions for the reciprocal crossing of the frontier were concluded. The case was one of which the occurrence must be rare, and although punishment is something beyond defence, the principle would seem to warrant the injured party in inflicting it where the repetition of the offence cannot otherwise be prevented.

not really infringed, for when a state is unable of itself to prevent a hostile use being made of its territory or its resources, it ought to allow proper measures of self-protection to be taken by the state against which the hostile use is impending, or else must be deemed to intend that use as the necessary consequence of refusing the permission. It is a principle of jurisprudence that every one is presumed to intend the necessary consequences of his actions. We cannot therefore subscribe to the condemnation which many continental writers have pronounced on the conduct of England in 1807.

It is with relation to the particular topic of international law which we are now considering that the principle of policy which for centuries has been known and acted on as the balance of power must be discussed. That principle may be stated as requiring that every European state, either by its own strength or by that of a political system to which it belongs and on the assistance of the other members of which it can rely, shall be able to resist all attacks which any other state or system may make on it. As a corollary, any state or political system may be prevented, by war if necessary, from increasing its relative strength so much as to give it a decidedly preponderating strength in Europe. The justification of this principle, so far as it can have any, must lie in the expectation that any state or system will use such strength as it has in attacking its neighbours or encroaching on their rights. And it would be difficult to deny that there have been states as to the conduct of which such an expectation was well founded, so that other states were warranted in trying to reduce or limit the strength which they could command either in themselves or by their alliances, in order to secure their own safety by a balance of power. It is more doubtful whether international practice was ever so bad that the expectation of attack could reasonably be founded on the mere possession of strength by a neighbour, without specific grounds for inferring his intention, and certainly now such general and *a priori* suspicion would be baseless. Nothing therefore savouring of the principle of the balance of power ought now to remain, except such precautions as in particular cases may commend themselves to a cool head not easily alarmed. The natural growth of a nation in power, and

even the increase of its armaments in a fair proportion to its population and wealth and to the interests which it has to defend, must be looked on without jealousy, and without any attempt to check it, by those nations which by an inferiority of character or situation are destined to a decline in relative power. Growth by accession of territory presents a different question. The principle that any alteration of the map of Europe is a matter of legitimate interest even to the remotest member of the European state system, though no doubt the principle of the balance of power as a means of self-preservation had the chief share in its establishment, has, now at least, a force of its own, due to the general importance of justice in any assemblage of men or states which has the least pretension to be regarded as a society[1]. But it is only for the sake of justice that any right of interference with an accession of territory exists.

Intervention.

The term intervention is used in international law to express two very different cases of political action. One is the interference of a state in affairs pending between two or more other states, the other is the interference of a state in the internal affairs of another state. Little remains to be said on the former after the observations which we have made on the principle of the balance of power. When the relations between any two or more states have either passed into war or reached a degree of tension clearly threatening war, to deny the right of any other state to intervene in support of justice would be to deny the existence of an international society. When an analogous situation exists between individuals in a nation provided with a police, if the police are not present, as they cannot always be, it is both the right and the duty of bystanders to put an end to a brawl or to intercept a blow by which a brawl would be commenced. Still more must this be at least

[1] See above, p. 48. Of course every state in turn which exacts a cession of territory after a successful war, or seeks to profit by the marriage or inheritance of its monarchs, denies that a third power has any voice in the matter. But every state in turn claims a voice in such matters when it deems it to its interest to do so.

a right among states not provided with a police, but having commercial and other interests unavoidably affected by a war in any part of the world, while it commonly happens that several of them have also separate interests connected with the quarrel or with the way in which it may be settled. In such circumstances the motive for intervention is always present in more or less strength, and the general judgment of history has never condemned statesmen for acting on it, when it has been adequate to compensate the damage and risk attendant on widening the area of an international quarrel, and when the action taken on it has been consonant with justice.

Intervention in the internal affairs of another state is justifiable in two classes of cases. The first is when the object is to put down a government which attacks the peace, external or internal, of foreign countries, or of which the conduct or avowed policy amounts to a standing threat of such an attack. The second is when a country has fallen into such a condition of anarchy or misrule as unavoidably to disturb the peace, external or internal, of its neighbours, whatever the conduct or policy of its government may be in that respect.

Of the first class no better example can be given than the decision of the great powers in 1815 to exclude Napoleon from the throne of France, as a man the experience of whose conduct precluded belief in any protestations of peacefulness which he might make. With this must be strongly contrasted the attempt which during a few years after the congress of Vienna was made by the continental great powers to rule Europe on the principle of legitimacy. In the circular despatch which, on the occasion of the insurrection at Naples, the courts of Austria, Russia and Prussia dated from Troppau, 8 December 1820, they said that "the powers have exercised an incontestable right in occupying themselves with taking in common measures of security against states in which the overthrow of the government by a revolt, even could it be considered only as a dangerous example, must have for its consequence a hostile attitude against all constitutions and legitimate governments." This was to assert a right of self-preservation against the contagion of revolution; to deny to a nation the right of establishing for itself free institutions, by force if they cannot otherwise be

attained, lest the example should be dangerous to autocratic governments in other countries. The true principle was expressed by Canning, when on 31 March 1823, on the occasion of the French intervention against the government which had been established by insurrection in Spain, he wrote to the British ambassador at Paris: "No proof was produced to his majesty's plenipotentiary of the existence of any design on the part of the Spanish government to invade the territory of France, of any attempt to introduce disaffection among her soldiery, or of any project to undermine her political institutions; and so long as the troubles and disturbances of Spain should be confined within the circle of her own territory, they could not be admitted by the British government to afford any plea for foreign interference. If the end of the last and the beginning of the present century saw all Europe combined against France, it was not on account of the internal changes which France thought necessary for her own political and civil reformation, but because she attempted to propagate first her principles, and afterwards her dominion, by the sword[1]." The system of the Holy Alliance treated the international society as one for the mutual insurance of established governments, and it was not until its defeat that "the modern state" of which so much is heard on the continent, and of which one essential characteristic is the distinction between a state and its government, fully emerged as the subject of international law[2].

In considering anarchy and misrule as a ground for intervention the view must not be confined to the physical consequences which they may have beyond the limits of the territory in which they rage. Those are often serious enough, such as the frontier raids in which anarchy often boils over, or the piracy that may arise in seas in which an enfeebled government can no longer maintain the rule of law[3]. The moral effect

[1] We quote the last sentence only for the principle, without implying anything as to the historical accuracy of the judgment passed by Canning on the wars of the French revolution, further than that it was certainly a true judgment so far as concerns the part taken in those wars by Great Britain.

[2] See above, p. 58.

[3] The piracy which acquired new vigour in the Levant during the long and devastating struggle for the independence of Greece was one of the justifications which Great Britain, France and Russia had for intervening.

on the neighbouring populations is to be taken into the account. Where these include considerable numbers allied by religion, language or race to the populations suffering from misrule, to restrain the former from giving support to the latter in violation of the legal rights of the misruled state may be a task beyond the power of their government, or requiring it to resort to modes of constraint irksome to its subjects, and not necessary for their good order if they were not excited by the spectacle of miseries which they must feel acutely. It is idle to argue in such a case that the duty of the neighbouring peoples is to look on quietly. Laws are made for men and not for creatures of the imagination, and they must not create or tolerate for them situations which are beyond the endurance, we will not say of average human nature, since laws may fairly expect to raise the standard by their operation, but of the best human nature that at the time and place they can hope to meet with. It would be outside our scope to pass judgment on present or recent cases, but it is by these principles that we must try such interventions as have taken place in Turkey, or as that of the United States in Cuba.

Let us now suppose that a state has intervened in the internal affairs of another, whether with sufficient justification or not: does that fact give to third states a right of intervention in the same affairs, on a principle sometimes advanced as that of intervention against intervention? We must say that the affairs in question have ceased to be purely internal from the moment of the first intervention, even if it was the body internationally recognised as the government which called in the foreign aid. The physical forces of two states are *de facto* concerned in them, and they have passed beyond determination by national power, in favour of which alone foreign power is called on to stand aloof. Third states may therefore step in, in support of justice or of their interests so far as consonant with justice.

It only remains to observe that the tender of advice to a foreign government, even about the internal affairs of its state, is not intervention and violates no right, though it is generally injudicious. Statesmen must remember that though governments and states are different, and it is to states that the rights

given by international law belong, yet it is governments that they have to live with and whose susceptibilities they will therefore find it needful to consult.

The Equality and Independence of States: the Great Powers.

The rights of equality and independence are often reckoned among the inherent rights of states. With regard to the first, semi-sovereign or dependent states are manifestly unequal to sovereign or independent ones, and even the latter are ranked for ceremonial matters in an order of precedence, while it is not pretended that they are or ought to be equal to one another in the influence which accompanies strength. Their equality consists in the fact that in the received principles and rules of international law, other than those of a ceremonial nature, no distinction is made between great states and small, so that the influence of strength is only lawful when exerted in modes which the right of self-defence does not authorise those on which it is exerted to resist. Thus considered, and there is really no other way of considering it, the equality of sovereign states is merely their independence under a different name.

We are here irresistibly reminded of the existence in Europe of the great powers as a separate and recognised class, and are led to ask whether it can be reconciled with the equality and independence which international law deems to belong to the smaller powers. There is no doubt that several times during the nineteenth century the great powers have by agreement among themselves made arrangements affecting the smaller powers without consulting them, and with the full intention that those arrangements should be carried into effect, although it has not been necessary to resort to force for that purpose because the hopelessness of resistance in those circumstances has led to an express or tacit, but peaceable, acceptance of the decrees by the states concerned. Lord Salisbury described the great powers as being, by virtue of the position thus assumed by them, the legislature of Europe. In a debate in the House of Lords on the Cretan question and the attitude of Greece and of certain British politicians with regard to it, 19 March 1897, he said:

"I do not take the integrity of the Ottoman empire for a permanent dogma. It was established by the legislature of Europe; it was established, it has been modified by them; no doubt it will be modified again....But what is done will be done by the consent of all the powers by which the integrity of Turkey was made part of European law. Much was said, not I think by the noble lord [Lord Kimberley] but by those who stood by him, in condemnation of the powers of Europe on this occasion. At least it may be said for them that they are representing a continuity of policy, and that they are maintaining the law of Europe as it has been laid down by the only authority competent to create law for Europe. They have been defied by a state which owes its very existence to the concert of Europe. If it had not been for the concert of Europe the Hellenic kingdom would never have been heard of....I feel it is our duty to sustain the federated action of Europe. I think it has suffered by the somewhat absurd name which has been given to it—the concert of Europe—and the intense importance of the fact has been buried under the bad jokes to which the word has given rise. But the federated action of Europe—if we can maintain it, if we can maintain this legislature—is our sole hope of escaping from the constant terror and the calamity of war, the constant pressure of the burdens of an armed peace which weigh down the spirits and darken the prospects of every nation in this part of the world....The engagements into which it enters must be respected....They must not be thrown over at the mere will of an outside power[1]."

It would be impossible to put better the argument in favour of the position assumed by the great powers, and if each of their proceedings be considered separately, the ratification subsequently conceded to it by the states affected saves it from being a substantial breach of their equality and independence, leaving it open only to the charge of a want of courtesy in manner. It stands as an example of political action, not to be condemned if just. But when such proceedings are habitual they present another character. They then carry the connotation of right which by virtue of human nature accretes to settled custom, and the acquiescence of the smaller powers in them loses the last semblance of independent ratification. We are in presence of the first stages of a process which in the course of ages may lead to organised government among states, as the indispensable condition of their peace, just as organised national government

[1] *Times* of 20 March 1897. The bad jokers to whom Lord Salisbury referred should remember that, since we habitually speak of "concerted action," music has no claim to monopolise the meaning of "concert."

has been the indispensable condition of peace between private individuals. The world in which the largest intercourse of civilised men has been from time to time carried on has not always been distributed into equal and independent states, and we are reminded by what we see that it may not always continue to be so distributed.

In the mean time the notion of sovereignty or independence has become the object of an extreme, possibly exaggerated, respect, which in speaking of the political action of states it is important to notice. The conclusion of a treaty by which a state should restrict its action, with a due consideration of the benefits to be gained thereby and stopping short of reducing itself to a condition of semi-sovereignty, would probably be regarded by few or none in England in any other light than as an exercise of its sovereignty. Elsewhere however it is often regarded as being *pro tanto* a renunciation of its sovereignty, as though the honour and almost the independence of a state depended on its preserving the utmost possible freedom to act on every occasion, unfettered even by obligations of its own creation. This feeling, although we may deem it jealous or punctilious, often has to be reckoned with. It was conspicuously exhibited in the opposition which Great Britain has met with at various times in her efforts to introduce, by conventions with other powers, a reciprocal right of visit for the suppression of the slave trade. And a notable instance of it has recently come under our observation in the remarks which have been made on the International Sugar Union of 1902. *Dérogeant aux idées jusqu'ici admises en matière de souveraineté, la Convention de Bruxelles a créé au-dessus des états contractants une véritable autorité internationale investie de pouvoirs propres.* It is remarked that the international unions previously existing for administrative purposes, with their head quarters at Bern or Brussels, have no functions but such as are simply consultative or ancillary to carrying out decisions. *Toutes les fois qu'il est nécessaire de prendre une décision, c'est aux états intéressés ou à leurs représentants réunis en conférence qu'il appartient de statuer. Et en règle générale pour être obligatoire cette décision doit, conformément aux usages diplomatiques, être prise à l'unanimité des voix.* But among the functions of the Sugar Union *il en est qui*

comportent des décisions exécutoires sans appel. Il en est qui peuvent aboutir à des décisions définitives ou souveraines[1].

This is the language of an able writer, not unfriendly to the Sugar Union, but pointing out, as a new and interesting step in the organisation of the international society, a peculiarity which in England was certainly not noticed as an international novelty, whatever consideration was given to its expediency.

The Monroe doctrine proclaimed by the United States has often been cited as a parallel to the position asserted for themselves by the great powers in Europe, and the two are indeed alike in being claims to regulate, more or less, the affairs of a quarter of the globe. But their relations to international law are different. The Monroe doctrine has not been systematically carried out by enforcing on the other American states arrangements in which they were not consulted, and there are signs that those states would not allow it to be so carried out. Consequently it must stand, at least for the present, as a policy which the United States are entitled to entertain so far as its application may in each instance be just, precisely as Great Britain and Russia have their policies for Central Asia; and it would be beside the scope of the present volume to examine its origin and development.

NOTE.

Some facts relating to the growth of the authority of the great powers may usefully be given, as illustrating what is fast becoming a part of international law. Our *Chapters on the Principles of International Law*, pp. 92—101, may be referred to.

At the congress of Vienna in 1814—15 "the committee of the five great powers"—Austria, France, Great Britain, Prussia and Russia—was formally constituted; and meetings of eight powers, being the five together with Portugal, Spain and Sweden, which had been parties to the alliance against France, were recognised. The final act was prepared for signature by the eight, but was not signed by Spain, which among the reasons for refusing mentioned the facts that the plenipotentiaries of the five "had no power to determine the destiny of Tuscany and Parma without the concurrence of the Spanish plenipotentiary, and that the act included

[1] N. Politis, *L'Organisation de l'Union Internationale des Sucres*, in the *Revue de Science et de Législation Financières* for January, February, March 1904.

many articles which had not been reported at the meetings of the plenipotentiaries of the eight powers."

In the war of 1815 the smaller powers took part, and claimed, but were refused, admission to the conferences for settling the terms of peace. The territories renounced by France and the pecuniary indemnity to be paid by her were placed by the treaty of 20 November at the disposal of the four great allies, who had determined their distribution by protocols of 3 and 6 November; and the other states submissively took the shares of territory and money thus assigned to them.

At the congress of Berlin in 1878, Italy now ranking as a great power, Servia and Rumania were raised to independence, and the independence of Montenegro, already recognised by the other great powers, was recognised by Great Britain and Turkey. The boundaries of Servia and Montenegro were enlarged and an exchange of territory was decreed for Rumania, and it was provided that in all three religion should be free and should not be a cause of incapacity. At the same time Turkey was recommended to enlarge the territory of Greece at her expense. Yet neither Rumania, Servia, Montenegro nor Greece was a party to the congress or to the treaty of Berlin, nor was Greece a party to the convention of 24 May 1881, by which the six great powers fixed with Turkey the limits of the enlargement which she was to receive; and although what was treated as an acceptance of her new limits had been obtained from Greece, it was not recited in the convention.

The position of Turkey is ambiguous. It is clear that the six, when they are agreed among themselves, treat her as a state on which their will is to be enforced: hence, since the great powers do not decide by the vote of a majority, it follows that at least in case of difference with her Turkey is not dealt with as a great power. But when she had arrived at an agreement with the six on the limits of the enlargement to be given to Greece—and not by way of simple acquiescence, such as was shown by the small states in 1815, for she obtained the exclusion of Epirus from the cession recommended to her at Berlin—she ranked as a seventh great power in imposing on Greece the terms so settled, as was practically done by the convention of 1881.

Note to Chapter XIII.

Page 304. The Art. 16 here quoted is that so numbered in the Hague Convention for the Pacific Settlement of International Disputes which issued from the Conference of 1899. When that convention was revised and enlarged at the Hague Conference of 1907 the article in question became Art. 38, and the following paragraph was added to it:

> Consequently it is desirable that in disputes regarding the above mentioned questions [*those of the interpretation or application of international conventions*] the contracting powers should, if the case shall arise [*the failure of diplomacy to settle the dispute*], have recourse to arbitration as far as the circumstances shall permit.

It will be observed that this paragraph does not extend the class of questions pointed out as suitable for arbitration, though it states more expressly the desire that in questions of that class arbitration shall be employed. But a step in advance was taken by Art. 48 of 1907, which repeated Art. 27 of 1899 with the following addition:

> In case of dispute between two powers, either of them may always address to the international bureau [*the permanent administrative council established by the next article*] a note containing its declaration that it is disposed to submit the difference to arbitration. The bureau must at once inform the other power of the declaration.

By this, any power which is party to a dispute and is desirous of submitting it to arbitration is invited, without reference to the nature of the question involved, to test the pacific temper of its adversary by a formal appeal to the Permanent Court. The adversary may decline to admit that appeal, but the fact that it was made will certainly be an element in the formation of public opinion on the dispute.

CHAPTER XIV.

THE PROTECTION OF SUBJECTS ABROAD.

General Principles.

In speaking of national jurisdiction we have seen to how large an extent the persons and the rights and property of foreigners are left to it, provided that it be exercised with integrity and impartiality and that there be no flagrant injustice in its methods or in the law enforced by it. The like conditions underlie the subjection of foreigners to the administrative action of the territorial government. If they are wanting either to the judicial or to the administrative department, the state to which a foreigner belongs has a claim to step in for his protection which often has this in common with political claims, that the justice which the foreign power demands for its subject is not measurable by definite rules. Often on the other hand the subject complains of the breach of a definite rule included in the *modus vivendi* of nations, and even where it is otherwise whatever pertains to justice in the case of an individual is nearly allied to the science of law, depending largely as it does on the general notions on which the peoples of European civilisation are agreed that legal and administrative procedure ought to be based. Consequently claims which are made in order to obtain redress or satisfaction for wrongs alleged to have been done to individuals, and which are not based on public rights, must as a whole be ranked with legal claims. Constituting as they do exceptions to the general rule of submission to the territorial jurisdiction or administration, they are perhaps of all parts of international law that on which it is most difficult

to say anything precise, and are peculiarly fitted for arbitration.

"Justice," Vattel says, "is denied, 1st, by refusing to hear your complaints or those of your subjects, or to admit the latter to establish their right before the ordinary courts; 2nd, by interposing delays for which no good reasons can be given, and which are equivalent to a denial or still more ruinous; 3rd, by a manifestly unjust or partial judgment. But the injustice must be very evident and palpable[1]."

On this we may say that it must be evident and palpable to the general conscience of the peoples of European civilisation, and not turn on the absence of some security to an accused person or a litigant which does not enter into the common law of those peoples, such as trial by jury or an equivalent to an English *habeas corpus*. Mr Evarts, secretary of state of the United States, wrote on 8 December 1877:

"It has from the very foundation of this government been its aim that its citizens abroad should be assured of the guarantees of law; that accused persons should be apprised of the specific offence with which they might be charged; that they should be confronted with the witnesses against them; that they should have the right to be heard in their own defence, either by themselves or such counsel as they might choose to employ to represent them; in short that they should have a fair and impartial trial, with the presumption of innocence surrounding them as a shield at all stages of the proceedings, until their guilt should be established by competent and sufficient evidence[2]."

To this may be added, from a despatch of Mr Blaine, 2 June 1881, "that an accused person shall be afforded an opportunity for a speedy trial[3]"; and from one of Mr Fish, 27 December 1875, that the trial "must be conducted without unseemly haste[4]." Unjust discrimination is repeatedly found among the complaints made in United States despatches; as an example we may mention that a law, by which the estate of a person dying in the country was to be confiscated unless the heirs appeared and claimed it, met with an urgent remonstrance

[1] *Droit des Gens*, l. 2, ch. 18, § 350.

[2] 2 Wharton's *Digest*, 623.

[3] *Ib.* 627.

[4] *Ib.* 620. This despatch was written on the occasion of the affair of the Virginius (see above, p. 171).

from Mr Evarts, 4 September 1879, as an unjust discrimination against citizens of the United States[1]. And Mr Bayard wrote, 21 May 1885, with reference to a debtor's power of obtaining his release by making an assignment of his property for the benefit of his creditors, that "to close to an alien litigant some given channel of recourse open to a native, without leaving open some equivalent recourse, is a denial of justice[2]."

When there has been a denial or failure of justice the state in which it has taken place stands as a unit to bear the responsibility of it. It cannot excuse itself by laying the fault on the judges or on a jury, however independent of the executive its constitution makes them, or on the legislature, however defective its laws may be, or on the authorities of a province which its constitution gives the central power no means of controlling while it prevents foreign states from having recourse to those authorities. In 1891 a mob at New Orleans, "as it would appear without any protest from state [Louisiana] or city governments[3]," broke open the jail and shot or hung many persons, several Italian subjects among them, who were suspected of the murder of the chief of the city police and of tampering with the jury which had acquitted them. The president expressed regret for the occurrence, and declared his purpose to recommend congress to grant an indemnity to the families of the victims, but the Italian government, quite rightly, demanded the prosecution and punishment of the leaders of the mob. This the president was unable to obtain, from the feeling in Louisiana and the want of power in the federal courts; and the Italian government withdrew the demand for punishment and accepted a money indemnity instead.

The grounds on which money compensation to the families of the murdered Italians, and satisfaction to their government for the outrage by the punishment of the criminals, were due in the instance just cited were that good will and due diligence on the part of the local authorities would have prevented the

[1] 2 Wharton's *Digest,* 625. The frequency of their citizens' dealings with the West Indies and Spanish America is the cause of the United States despatches abounding on the subject of their protection.

[2] *Ib.* 643: Van Bokkelen's case.

[3] Thus the summary in Scott's *Cases on International Law,* p. 328.

occurrence, and that the necessary power in the federal courts would have ensured its punishment. But such grounds are often wanting when foreigners suffer in the course of disturbances beyond mere riots. During an insurrection the best will on the part of the state government, backed by the best laws, is often unable to prevent or to punish regrettable occurrences. In those circumstances it is not usual for a state to indemnify its own subjects, and foreigners can have no better claim than nationals in a matter not generally recognised as one for indemnity; while the maxim *nemo tenetur ad impossibilia* negatives any responsibility of the regular government for an indignity which the insurgents may have offered it out of the reach of its forces. Foreigners must even be content to submit, in common with nationals but not by way of discrimination from them, to those measures beyond the ordinary course of law or administration which the government may find it necessary to adopt for the suppression of the insurrection, so long as they do not conflict with humanity or with substantial justice. Every state in turn resorts to such measures when the necessity for them arises, and covers them *ex post facto* by an act of indemnity if they are not provided for in advance by exceptional laws for extraordinary occasions. During the American civil war president Lincoln suspended the writ of *habeas corpus*, claiming constitutional authority to do so under the so-called war power, which the Supreme Court, of course ineffectually, denied him. Earl Russell complained on behalf of British subjects, but ultimately and rightly acquiesced. The measures for putting down insurrection might be frustrated if governments had any other duty towards foreigners than to see that they are applied to them on an equality with nationals, without undue harshness, and with reasonable grounds in the case of each person. If, while governments observe these conditions, they are in conflict with and overrule any other authority of their state, as Lincoln did the Supreme Court, their position at the worst is that of having possessed themselves of power by a *coup d'état*, and international recognition is not denied to those who strike successful *coups d'état*.

Contractual claims.

Coming now to a more particular consideration of the protection of subjects in respect of the contractual claims which they may have in foreign countries, we may first notice that the United States have been led, by the great extent to which their citizens have engaged in enterprises in countries where the security of civil rights has not been of the highest order, to adopt a very cautious policy. Mr Seward, secretary of state, wrote on 27 April 1866: "The people who go to these regions [South America] and encounter great risks in the hope of great rewards must be regarded as taking all the circumstances into consideration, and cannot with reason ask their government to complain that they stand on a common footing with native subjects in respect to the alleged want of an able, prompt and conscientious judiciary. We cannot undertake to supervise the arrangements of the whole world for litigation, because American citizens voluntarily expose themselves to be concerned in their deficiencies[1]." This language points to a sparing exercise of the common right of interfering in case of a denial of justice, and we believe that such has been the practice of the United States where there has been no unjust discrimination against their citizens.

In the case of contracts between their citizens and foreign governments the United States appear to go still further. Mr Fish, secretary of state, wrote with reference to such cases on 27 June 1870: "The department has usually limited its interposition to authorising the proper diplomatic agent of the government abroad to use his personal good offices toward obtaining relief for the claimant. The reason for this policy is that claims based on contract are supposed to stand upon a very different footing from those which arise from injuries to person and property committed by the authorities of any foreign government[2]." But this is not made an absolute rule. Mr Frelinghuysen, secretary of state, wrote on 17 January 1884: "There are also cases, but not common enough to form

[1] 2 Wharton's *Digest*, 655.
[2] *Ib.* 656.

a rule of action, where, the bonds of one government being wholly or largely held by the citizens of another, upon default thereof the government of which the creditors are citizens may endeavour by diplomatic remonstrance or negotiation to effect an international agreement between the two countries, prescribing time and manner of adjustment[1]." And Mr Cass, secretary of state, in a despatch of 25 July 1858, promised interposition on behalf of citizens whose contracts with foreign authorities should be declared forfeited, "unless there has been a fair and impartial investigation in such a manner as to satisfy the United States that the proceeding has been just[2]." Possibly a distinction may here be intended between not enforcing a contract and allowing it to be declared forfeit.

It appears to us that contracts with foreign governments ought not to be treated as forming a single class. We will repeat on that point language of which ten years' experience and reflection have confirmed to us the justice. "A distinction seems to exist between the case of bonds forming part of a public loan on the one hand, and contracts such as those for concessions or the execution of works on the other hand. Interests of the latter kind usually enjoy regular protection by law, notwithstanding that a government is the defendant against whom relief is to be sought. There is a petition of right, a court of claims, or an appropriate administrative tribunal before which to go. The case is not essentially different from any other arising between man and man. The foreigner who has contracted with the government has not elected to place himself at its mercy, and the rule of equal treatment with nationals requires that he shall have the full benefit of the established procedure, while if in a rare instance there is no such established procedure, or it proves to be a mockery, the other rule of protecting subjects against a flagrant denial of justice also comes in. But public loans are contracted by acts of a legislative nature, and when their terms are afterwards modified to the

[1] 2 Wharton's *Digest*, 663. And see Mr Evarts, 31 Oct 1877, admitting "an exception to the general rule" where the government in question does not hold itself amenable to judicial suit by foreign claimants on contracts made by it.

[2] *Ib.* 661.

disadvantage of the bondholders this is done by other acts of a legislative nature, which are not questionable by any proceeding in the country. If therefore the rule of equal treatment with nationals be looked to, the foreign bondholder has no case unless he is discriminated against. And if the rule of protecting subjects against a flagrant denial of justice be looked to, the reduction of interest or capital is always put on the ground of the inability of the country to pay more—a foreign government is scarcely able to determine whether or how far that plea is true—supposing it to be true, the provisions which all legislations contain for the relief of insolvent debtors prove that honest inability to pay is regarded as a title to consideration—and the holder of a bond enforceable only through the intervention of his government is trying, when he seeks that intervention, to exercise a different right from that of a person whose complaint is the gross defect of a remedial process which by general understanding ought to exist and be effective[1]." Hence we think that the assistance of their state ought not to be granted to the bondholders of public loans, unless the defaulting government presumes to treat its internal and external debts on terms of inequality unfavourable to the latter. But we see no reason for not granting, on other contracts with foreign governments, the same assistance which, on the general principles relating to the protection of subjects, is due to them when suffering the denial or failure of justice on their contracts with private persons.

Hall however sees no difference in principle between what may be called the private contracts and the public loans of a government, though he admits a difference in practice relating to them. And both Lord Palmerston and Lord Salisbury maintained the view that the right of intervention on behalf of bondholders is unquestionable, although its exercise ought to depend on the balance of considerations, the amount of loss in the particular instance being weighed against the general expediency of discountenancing hazardous loans. Continental

[1] *Chapters on the Principles of International Law*, p. 107, with some verbal alterations.

writers uphold such intervention as an important exercise of the right of self-preservation applied to the national fortune[1].

It remains to notice a special and we think wise rule of the United States. "By adopting a foreigner under any form of naturalisation as a citizen, this government does not undertake the patronage of a claim which he may have upon the country of his original allegiance or upon any other government. To admit that he can charge it with this burden would allow him to call upon a dozen governments in succession, to each of which he might transfer his allegiance, to urge his claim. Under such a rule the government supposed to be indebted could never know when the discussion of a claim would cease[2]."

[1] Rivier says: *La fortune des particuliers, sujets de l'État, forme un élément de la richesse et de la prospérité de l'État même. Il a intérêt au maintien, à l'accroissement de cette fortune. Si donc elle est compromise par le fait d'un État étranger qui administre mal ses finances, qui trahit la confiance que les particuliers ont eu en lui lorsqu'ils ont souscrit à ses emprunts à des conditions qui ne sont pas observées, qui viole ses engagements à leur égard, l'État auquel appartiennent les particuliers lésés est évidemment autorisé à prendre leurs intérêts en main de la manière qu'il jugera convenable.* T.I. p. 272; under the general head of *le droit de conservation.*

[2] Mr Fish, 16 May 1871. 2 Wharton's *Digest*, p. 656.

Note to Chapter XIV.

Page 331. In 1902 Great Britain, Germany and Italy had outstanding pecuniary claims against Venezuela on behalf of their subjects, for injuries sustained in times of revolution, interest on bonds issued by the Venezuelan government for the construction of railways and other public works, and special contracts with that government. These were enforced by the creditor states through operations which in Part II of this work —*War*—pp. 15, 16, we have shown to have been, at least on the part of Great Britain and Germany, rather war than pacific blockade. By a note of 29 Dec. 1902 Dr Drago, the minister for foreign affairs of Argentina, drew the attention of the United States to these proceedings as threatening the independence of the smaller American republics. He was understood to deny that force can ever be properly employed against a government on behalf of the pecuniary claim of a foreign subject. M. Calvo circulated the note to a number of jurists of different countries, with a request for their opinions on it. The present writer, who was one of those so addressed, drew in reply the distinction contended for in the present chapter between public loans and special contracts, only the claims arising from the former not to be supported by international force[1]. Dr Drago had not in fact intended to go so far as had been understood. His developed doctrine is given in an article which he contributed to the *Revue Générale de Droit International Public*, t. 14, pp. 251—287, and is as follows. As to interest in arrear on a public loan, it ought to be accepted as sufficient if foreigners and internal holders receive equal treatment (p. 267). Other pecuniary claims against a government should be determined in its courts, not by any summary procedure (pp. 257, 266), and the time to be allowed for payment of the sum adjudged should be submitted to arbitration, in which the debtor's financial situation should be examined (p. 266). The award would have

[1] The note and M. Calvo's circular, with the replies to the latter, are printed in the *Revue de D. I. et de L. C.*, 2me série, t. 5, pp. 597—623.

the force of a treaty (p. 266), and Dr Drago seems not absolutely to exclude its enforcement *manu militari* (p. 261). This therefore ought to be taken as the true "Drago doctrine," the name under which there has been much controversy.

The question was brought before the Hague conference of 1907 by General Porter, one of the plenipotentiaries of the United States, and was answered by the Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, which runs as follows, in close agreement with the General's proposition.

Art. 1. The contracting powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals.

This stipulation, however, is not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or after accepting the offer renders the settlement of the agreement of reference impossible, or after the arbitration fails to conform itself to the award.

Art. 2. It is further agreed that the arbitration mentioned in the second paragraph of the preceding article shall be subject to the procedure laid down in Part IV, chapter 3, of the Hague convention for the Pacific Settlement of International Disputes. The award shall determine, except where otherwise agreed between the parties, the validity of the claim, the amount of the debt, and the time and mode of payment.

It will be observed that the convention applies to all contractual debts, without any distinction between those arising from ordinary contracts and those arising from the issue of public bonds. Dr Higgins however justly remarks that "the abstention of ten states from signature and the reservations in the case of ten others considerably weakens the force of this convention, especially as the states abstaining or making reservations are mainly those against whom it has been found necessary to exercise force in the past[1]." Argentina, Guatemala and Salvador made the reservations which had been announced by Dr Drago in the committee, excluding an appeal to arbitration on debts arising from ordinary contracts until the legal remedies in the courts of the debtor state have been exhausted, and in the case of bonds of a national debt excluding in any circumstances military aggression, or the actual occupation of any American soil.

[1] *The Hague Peace Conferences*, p. 192.

It remains to be said that, by Art. 53 of the convention of 1907 regulating the Permanent Court of Arbitration, that court is competent to settle the agreement of reference on the request of either party alone, when the dispute arises from contract debts claimed from one power by another power as due to its nationals, and all attempts to reach an agreement by diplomatic means have failed. This competence, and the discretion of the court to fix the time and mode of paying what is found due, are important advances on the power of answering a legal question put to it by the parties in agreement for that purpose.

CHAPTER XV.

INTEROCEANIC SHIP CANALS.

The arrangements as to the Suez canal, and as to the intended "ship canal to connect the Atlantic and Pacific oceans by whatever route may be considered expedient[1]," belong to international law not merely in the loose sense in which a knowledge of that law includes a knowledge of the principal contractual arrangements existing among states. Those canals are or will be of strategical and commercial importance so great that they could not be left simply as internal waters of the states through the territories of which they pass, nor on the other hand did the general interest allow of their being treated on the same footing as natural straits. A system therefore had to be elaborated in the case of the Suez canal, as the first, by the joint influence of facts and of negotiation; and now that that system has been applied to the intended American canal by the Hay-Pauncefote treaty between the two great North American powers, Great Britain and the United States, it must be considered as the *modus vivendi* established for a class of cases, though a restricted one, and therefore as belonging to international law in the narrower sense as much as any other rule of that science in establishing which the concrete as well as the abstract has had to be taken into account. Some detail on the process of its elaboration may be excused as an illustration of the growth of international law.

[1] The description in the preamble to the Hay-Pauncefote treaty of 18 November 1901.

The Pharaohs and Ptolemies contemplated a canal from the Nile to the Red Sea, but the first recorded suggestion of a canal across the isthmus was made to Mehemet Ali in 1836, by two French engineers, old Saint Simonians. The pasha asked the advice of Prince Metternich, who postponed giving it till the plans should be reported practicable by the engineers consulted on behalf of Egypt; and when this was done in 1838 he advised that the canal should be undertaken but neutralised by a European treaty, probably not attaching the strict meaning of neutrality to the term. The project however remained for a time in suspense, owing to the troubles which arose from the overweening ambition of Mehemet; and when, at the conclusion of those troubles in 1841, the closure of the Bosphorus and Dardanelles to ships of war while the sultan is at peace was embodied in the convention of London between the great powers, Metternich pointed out that convention to Mehemet as a precedent[1]. The first concession was made by Saïd Pasha on 30 November 1854 to M. Ferdinand de Lesseps, who in pursuance of it formed a company with statutes dated 5 January 1856, fixing its seat (*siége social*) at Alexandria but its administrative, legal and jurisdictional domicile at Paris, and adopting for its regulation the principles applicable to French *sociétés anonymes* (arts. 3 and 73)[2]. A second concession of the last mentioned date recognised the company, and declared (art. 14), subject to the sultan's ratification which was necessary for both concessions, "that the canal and the ports dependent on it shall be for ever open, as neutral passages, to all merchant ships crossing from one sea to the other, without any distinction, exclusion or preference of persons or nationalities, on payment of the dues and observance of the regulations established by the company." But nothing was said about ships of war.

[1] Sir Travers Twiss, in 7 *R. de D.I. et de L.C.* 632, and in the *Annuaire de l'Institut de Droit International*, 1879/80, pp. 114, 119.

[2] The effect of this is to make the nationality of the company Egyptian, while transferring to France and French law the consequences as to the internal management which would generally result from the nationality of a company. See the *Concessions, Conventions, Statutes and Resolutions of the Suez Canal Company, with the Sultan's Firman*: Parliamentary Papers, Egypt, no. 6 (1876); c. 1416.

Two difficulties retarded the ratification of the concessions by the sultan, who in a matter of such worldwide importance could not well act without the approval of the powers. One was that the concessions included not only the land required for the canal and a freshwater communication which the company was empowered to make between it and the Nile, but also all the public land which should be irrigated and brought into cultivation by the company, subject after ten years to the same taxes as similar lands, an immense grant which was left indefinite by the maps referred to in the concessions not having been really made. The objection raised to this establishment of a practically French company as lord of the soil in the heart of Egypt was ultimately met by the company's abandoning to the pasha its right to the freshwater canal and the land grant in connection with it, in consideration of indemnities of ten million francs for the former and thirty million for the latter. The other difficulty was Lord Palmerston's desire that the canal should not be large and deep enough to admit line-of-battle ships, to which the Porte on 1 August 1863 directed the pasha of Egypt to give effect, but to do so was found to be impracticable because the size of merchant ships had increased so greatly that to admit them and exclude line-of-battle ships was no longer possible, and the point was tacitly dropped. The final terms were embodied in a contract of 22 February 1866 between the pasha and the company, by art. 10 of which the Egyptian government reserved the right of "occupying every position or strategical point which it should deem necessary for the defence of the country, such occupation not to obstruct the navigation and to respect the servitudes attached to the banks of the canal." This contract was confirmed by the sultan's firman of 19 March 1866, and the canal was opened on 17 November 1869.

Thus when the Franco-German war broke out in 1870 the Suez canal was territorial water, subject to no other modification of the usual rights in such water than an engagement not to exclude merchant ships or obstruct their passage on any ground. The passing of belligerent ships of war through the canal would therefore be legally a breach of the neutrality of the Turkish empire, and whichever party to the war was not the first to pass through might complain of the other's doing so, reserving

equal liberty for himself till the strict law should be applied to both. Nevertheless the ships of war of both belligerents used the canal without any complaint being made. And disputes having arisen about the company's tariff, an international commission assembled at Constantinople drew up, under date 18 December 1873 and with the signatures of the delegates of all the maritime powers of Europe except Portugal, which abstained for other reasons, a scale of dues in which those payable for ships of war and transports were inserted without any exception of belligerents. But those incidents, important as they were, could not be considered as sufficient to settle the question, and in the beginning of 1877 the shareholders of the company were naturally anxious at the evident approach of war between Turkey and Russia, which would raise the question in the acute form resulting from the territorial power being one of the belligerents. By that time the British government had become one of the largest shareholders, and inspired by that interest, by its duty as a great power to consider the general welfare, and by the peculiar importance to it of the canal as furnishing the shortest route to India, it took action which was clearly political as distinguished from legal and was universally approved.

The company's bulletin of 12 February 1877 published the following communication made by the British government to the general meeting of shareholders. "An attempt to blockade or otherwise interfere with the canal or its approaches would be regarded by H.M.'s government as a menace to India and a grave injury to the commerce of the world. On both these grounds any such step, which they hope and believe there is no intention on the part of either belligerent to take, would be incompatible with the maintenance by them of an attitude of passive neutrality." An attempt by the British government to unite that of France with its action led to no result, but the former having made to the Russian ambassador (May 6) a communication similar to that made to the company, Prince Gortchakow replied (May $\frac{18}{30}$) that "the imperial cabinet will neither blockade nor interrupt, nor in any way menace, the navigation of the Suez canal. They consider the canal as an international work, in which the commerce of the world is interested, and which should be kept free from any attack."

On May 4 Lord Derby made known in the House of Lords a determination to maintain the free passage of the canal for British ships of war, whereupon M. de Lesseps proposed to him to seek an international agreement on the subject, but Lord Derby answered that the proposal was "open to so many objections of a political and practical character that [H.M.'s government] could not undertake to recommend it." And he intimated to the Porte and to the khedive (to which rank the pasha of Egypt had been raised in 1867) that H.M.'s government would expect them to "abstain from impeding the navigation of the canal, or adopting any measures likely to injure the canal or its approaches; and that [they] were firmly determined not to permit the canal to be made the scene of any combat or other warlike operations[1]."

The general acquiescence in the principles thus laid down by Great Britain and Russia, and the use of the canal, subject to them, by both Russian and Turkish ships of war, established an unquestioned understanding that no hostilities or warlike operations should take place in the canal, that its mouths should not be subject to blockade, that on that footing the canal should be free to ships of war of belligerents, and that the territorial power, if a belligerent, should stand in those respects on the same footing as any other power. From these lines there has not since been any deviation, though more had to happen and be determined before their embodiment in a convention. Contrasting the system with that in force for the Sound and Belts, we see that the territorial power, if belligerent, enjoys a protection from hostilities in the artificial strait and from blockade at its mouths which is entirely wanting to him in the natural straits; that neutrals may profit by that prohibition of blockade in cases where, if the strait were a natural one, they would have no security for their commerce but that resulting from the territorial character of the water which might otherwise be the scene or base of a given operation; and that on the other hand the territorial power is obliged to permit the free passage of his enemy, which in a natural strait he is not[2].

[1] *Annuaire*, 1879/80, pp. 112, 113, 126; Parliamentary Papers, Egypt, no. 1 (1877), and Russia, no. 2 (1877).

[2] See above, p. 197.

In the summer of 1882 the insurrectionary movement of the Egyptian army under Arabi Pasha was generally considered to threaten danger to the canal. Arabi had expressed his intention of respecting its immunities, but the same confidence could not be felt in the intentions of a revolutionary government, and of leaders not yet firmly seated in their places, as in those of rulers tested by experience and holding a responsible position in the commonwealth of nations; and confidence is the life both of statesmanship and of trade. A conference was sitting at Constantinople on the means to be taken for restoring order in Egypt. Signor Mancini, the Italian minister for foreign affairs, had desired from the first that it should undertake the preparation of a complete international agreement with regard to the canal, but he did not succeed in getting its object so extended. When the danger to the canal was considered to have become imminent, England invited France and Italy to join her in measures for its protection. M. de Freycinet agreed, but the French chamber threw out his bill for a pecuniary credit for the purpose, and his ministry was replaced by that of M. Duclerc. Mancini also agreed, but only on condition that the protection should take the form of a maritime police in which it should be open to all interested powers to join, and that operations on land should be reserved for a further understanding in case they should become necessary. At the twelfth meeting of the conference the Italian representative made a proposal in that sense, so worded as to seem to point to a permanent international maritime police for the canal. At the fifteenth meeting Germany, Austria, Russia and Turkey adhered to the proposal; and England did so also, but on condition of the measure being only temporary, and reserving the right of any power to land troops for the security of the canal, and, expressly, her own military operations undertaken with a view to the restoration of the khedive's authority. But the conference was already moribund; joint action by all the powers for the protection of the canal could scarcely be hoped for by the most sanguine; and Prince Bismarck had objected to a mandate for action being given by all the powers to some of them, because it would, he said, "create an unlimited responsibility for the measures resorted to, without control over them and without the possibility of withdrawal." The isolated

action of England remained as the only practicable course, and in spite of the formally correct protest of M. de Lesseps Sir Garnet Wolseley's expedition entered the canal at Port Saïd, sailed through it to Ismailia at its centre, there disembarked troops and munitions of war, and made Ismailia the base of the operations which resulted in the victory of Tel-el-kebir and the occupation of Cairo.

These were warlike operations, such as by the general understanding since the Russo-Turkish conflict were to be excluded from the canal. The party against which they were directed was the actual government of Egypt, and although it was a party of insurgents against a legitimate ruler, yet on that ground to pretend that they were merely operations of police would be equivalent to denying the name of war to Waterloo. But the other powers received them with tacit acquiescence, which must be taken to have shown that no understanding would be allowed to interfere with the task of protecting the canal, when undertaken in case of necessity and in good faith, and carried out with no serious disturbance of commerce.

The occupation of Egypt by England, and her refusal to renew the dual control in that country which England and France had enjoyed before Arabi's insurrection, led to Lord Granville's circular of 3 January 1883 to the powers in which, among other things, he stated the bases of an international agreement with regard to the canal which H.M.'s government thought might be concluded with advantage. It is not necessary to suppose that he thought differently from Lord Derby of the political and practical objections to which the proposal of such an agreement might be open, but it was plain that the other governments would require some more express security for the freedom of the canal, now that it had practically fallen into the hands of a strong state, than they had been content with while the territorial power, virtual as well as nominal, was a weak one. From this date therefore the question of fixing the legal system of the canal by treaty was regularly before the world. In 1885 a commission of delegates met for the purpose at Paris, Spain and the Netherlands, and Egypt with a consultative voice, being represented on it as well as the great powers including Turkey. The result was a draft to which the only objections were made

by England and Italy. The most important objection related to an article prohibiting acts of war, or preparatory to operations of war, being done "in the approaches to the canal or in the territorial waters of Egypt." England and Italy desired to substitute "in the ports of access, as well as within a radius of three sea miles from those ports"; while the other powers, in maintaining the words objected to, reserved the extent of the territorial waters of Egypt for an ulterior agreement. The Russian delegate, M. Hitrovo, had maintained, in the sitting of 11 June, that "the treaty would be illusory unless the approaches of the canal were made to comprise a neutral passage through the Red Sea into the Gulf of Aden." Afterwards the negotiations were resumed between England and France, who in October 1887 agreed to an amended draft, which was signed by Turkey and the other powers on 29 October 1888 and is known as the Suez Canal Convention.

The ratifications were deposited at Constantinople on 22 Dec. 1888, but not exchanged. At the conference in 1885 M. Barrère, one of the French delegates, as reporter of the drafting committee, stated that it had abstained from examining how far the treaty which it was preparing was compatible with the then transitory and exceptional condition of Egypt. And at the close of the conference the British delegates, in presenting such a draft as their government was prepared to accept, stated that they "consider it their duty to formulate a general reservation as to the application of its provisions in so far as they would not be compatible with the transitory and exceptional state in which Egypt now exists, and as they might fetter the liberty of their government during the occupation of Egypt by the forces of Her Britannic Majesty." In 1887 Lord Salisbury accompanied his acceptance of the Anglo-French draft by a renewal of that reservation, which it may be presumed has not been unconnected with the delay in the exchange of the ratifications of the Suez Canal Convention. Now, by art. 6 of the Anglo-French Declaration of 8 April 1904 respecting Egypt and Morocco, "H.B.M.'s government declare that they adhere to the stipulations of the treaty of the 29th October 1888, and

[1] Parliamentary Papers; Egypt, no. 19 (1885), p. 305; Egypt, no. 1 (1888), p. 36.

that they agree to their being put in force"; so it is to be expected that the ratifications will be exchanged, if they have not already been so. But whether with or without an express reservation, it must be considered that, in future as in 1882, rules having the freedom of the Suez canal for their object cannot be interpreted as hindering the protection of that freedom by the power best able to give it, in good faith and with no avoidable disturbance of commerce.

The articles of the Suez Canal Convention may be summarised as follows. Art. 1: The canal is to be open, in war as well as in peace, to ships of war and merchant ships of all flags; and is never to be blockaded. Arts. 2 and 3 relate to the security of the company's property and of the freshwater canal. Art. 4: No act of hostility, or intended to obstruct the free navigation of the canal, is to be done in the canal or its ports of access, or within three sea miles of those ports, even should the Porte be a belligerent power. Arts. 4 to 7: Particular provisions relating to ships, munitions and material of war, prizes and troops, which will interest us when we come to the laws of war. Art. 8: The duties of the representatives of the signatory powers in Egypt with regard to securing the freedom of the canal, now modified by the Anglo-French declaration above referred to. Arts. 9, 10, 11: The duties of the khedive and the Porte with regard to securing the freedom of the canal. The immunities of the canal are not to apply to measures taken for the purpose by the sultan, or by the khedive in his name, with their own forces, or to those which the Porte may concert for the purpose with the other powers. But in any case the measures are not to be an obstacle to the free use of the canal, and permanent fortifications are not to be erected. Art. 12: No power is to seek territorial or commercial advantages, or any privileges, with regard to the canal. But the rights of Turkey as the territorial power are reserved. Arts. 13 to 16: Not here important, except that the convention is not to be limited by the canal company's concession, which is one of 99 years.

In dealing with the extension of the system thus established to the other, still future, artificial interoceanic waterway of the world, we are not concerned with the negotiations and questions relating to the right to construct and regulate the latter. They

ended in the supersession of the Clayton-Bulwer treaty of 19 April 1850 between Great Britain and the United States by the Hay-Pauncefote treaty of 18 November 1901 between the same powers, and in the purchase by the United States of the half executed Panama canal, and a treaty between them and the new republic of Panama, through whose territory it passes. The result is that the United States fully enjoy so far as concerns that canal, and enjoy as against Great Britain so far as concerns any other route which the intended waterway between the Atlantic and Pacific oceans may take, the right of completion or construction, as well as the exclusive right of regulation and management of the canal when finished; in short, a position combining that of the Suez Canal Company with that of the territorial power. For their conduct in exercising those rights the United States adopt by the Hay-Pauncefote treaty, as the basis of what is called the neutralisation[1] of the canal, "the following rules, substantially as embodied in the convention of Constantinople for the free navigation of the Suez canal, that is to say: (1) The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable. (2) The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States however shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder." The remaining rules are practically similar to those of the Suez Canal Convention relating to ships, munitions and material of war, prizes and troops, and to the security of the property connected with the canal, rule 5 expressing that the provisions "shall apply to waters adjacent to the canal within three marine miles of either end."

To the system thus established for the Central American canal of the future the express assent of the European states has not been invited. Their assent may be assumed from their own

[1] It is not really neutralisation, since neutrality does not admit the passage of belligerent forces across the territory.

establishment of the same system in the old world, and because the concurrence of the two great powers of North America must carry for that part of the new world something of the same authority which the concurrence of the great powers carries for the old, especially with relation to a waterway so vitally affecting the communication between the Atlantic and Pacific coasts of each. We may treat the conditions, under which interoceanic ship canals can be made conducive to commerce and all peaceful development, as being henceforth an ascertained part of international law.

Notes to Chapter XV.

Page 346. Mr Balfour made the following statement in the House of Commons on 8 August 1904. "No treaty has been concluded with Germany on the subject, but Germany, Austria-Hungary and Italy have not only, like Russia, assented to the khedivial decree, but have also undertaken not to obstruct the action of Great Britain in Egypt, by asking that a limit of time be fixed for the British occupation or in any other manner, and agreed that the execution of the last sentence of paragraph (1), as well as of paragraph (2), of Art. 8 of the treaty of 29 October 1888 shall remain in abeyance. On the other hand H.M.'s government have given an assurance to those powers that they guarantee to their commerce in Egypt most-favoured-nation treatment for thirty years—that they will respect the rights which in virtue of treaties, conventions and usages they enjoy in Egypt—that their schools in Egypt shall continue to enjoy the same liberty as in the past—and that officials of those nationalities now in the Egyptian service shall not be placed under conditions less advantageous than those applying to the British officials." *Times* of 9 August 1904.

Page 348. We have it on the authority of Sir Malcolm McIlwraith that the statement about the Council of Ministers in Egypt, which in the first edition of this volume was quoted from the *Times* in the note on p. 331, is without foundation, and that the prizes which they were escorting through the canal were released by the Russians because coal had not been officially declared contraband at the date of the captures.

APPENDIX.

INTERNATIONAL ARBITRATION,

BEING AN ARTICLE WHICH APPEARED IN THE INTERNATIONAL JOURNAL OF ETHICS FOR OCTOBER 1896.

[*This article is reprinted as it stood, its substance being still applicable. The reader is referred to pages* 302—305 *above.*]

1. *International Arbitration contrasted with International Government.*

In the early years of the seventeenth century, Henry IV of France and his minister Sully were busy elaborating what they called the Great Design. Christian Europe, excluding Muscovy, was to be formed into an organised body with a government—legislative, judicial, executive—backed by a common force of two hundred and seventy-three thousand soldiers and one hundred and seventeen great ships. For this purpose its political boundaries were to be rearranged in a very thoroughgoing manner, so that six hereditary and six elective crowns with three republics should form the fifteen states of the federation, sufficiently equal in strength to secure its stability. Even the internal affairs of these states were to be so far subject to the common government that domestic wars of religious and political factions should be prevented equally with international wars. The king and the minister well knew that such an institution could only be established by force, and it may be doubted whether they dreamed of its establishment as possible even as the result of the enterprises which Henry was preparing when the knife of Ravaillac ended his life.

But even the visions with which kings and ministers amuse themselves require some explanation when they depart so far from the common. Arbitration and mediation were not unknown. There has never been a time in history when they were unknown, and they had often been the instruments of maintaining peace. Why, then, did Henry and Sully not take them as the basis of the method by which they dreamed of securing perpetual peace? The answer is that the renaissance had not quite spent its force, and the renaissance, like France herself, was bold and logical. Over independent states there could be no power to enforce submission to arbitration or performance of an award. The path which had led to the existence of so much social order as was enjoyed within a state was the submission of individuals to government. Perpetual peace could not exist between states unless they, too, submitted to some government, sacrificing a part of their independence to found an ordered commonwealth of nations. At the same time the slow processes of evolution had not been studied; what the best spirits of that age saw to be ultimately necessary they could not believe to be immediately impossible.

The vision of the Great Design long haunted thinkers, though statesmen had done with it. Saint Pierre, Bentham, and Kant in the eighteenth century—even Saint Simon in the opening of the nineteenth—formed projects of perpetual peace founded on the submission of states to government, though, not having armies at their back, they could not imitate their illustrious forerunners by proposing the preliminary rearrangement of Christendom. But now thinkers, too, are no longer under the spell. They have turned from sketching imaginary international governments to the more practical, or more immediately practical, task of promoting international arbitration. Two powerful causes have contributed to this change of line.

First, the idea of national independence has grown so much in strength that even a theorist would now hesitate to advocate the surrender of any part of that independence. The world of Henry and Sully was one in which a very large number of men, including many of the best and most earnest, felt themselves nearer, even for purposes of action, to foreigners of their religion than to their fellow-countrymen of a different religion.

Of this state of things the only remaining trace is the sentiment which would disturb national politics in order to restore the temporal power of the papacy—a sentiment of such limited influence that it may be regarded as one of those exceptions which prove rules—the rule in this case being the supremacy of the state tie in the modern world. Again, in the time of Henry and Sully the liberties known and valued in the larger part of Europe were chiefly provincial and municipal liberties. If these were left untouched, a province or a city bore with equanimity its transfer from one larger political aggregate to another, in neither of which was it allowed much influence on the conduct of the greater affairs of state. But now every Christian country is permeated by a national life; its people are powerful and conscious factors in determining its international attitude, even though their power to do so may not be recognised in its constitutional forms; they are deeply attached to the independent national existence which they feel to be their own existence.

Secondly, abundant experience of international arbitrations has proved that the awards given in them are generally carried out. Logic may reiterate the warning that there is no security for their being carried out, but the theoretical imperfection of arbitrations arising from this cause is not felt to be practically a great deduction from the value of the service which they can render to peace.

The two causes which have been noticed may be summed up by saying that thinkers have turned from schemes of international government to promoting international arbitration, because the surrender of any part of national independence is felt to be at once less possible and less necessary.

Here, however, before I leave the subject of international government, I would guard myself against being supposed to imply that the ultimate destiny of civilisation will not be in that direction. What is clear is that an ordered commonwealth of nations will not come about by constitution-mongering, but it is not clear that evolution is not working for it. Let any one consider the authority which during the present century has been assumed by the great powers of Europe, and exercised by them at the Congress of Vienna in 1814–15, and at that of

Berlin in 1878. Let him consider the prohibitions against exercising the belligerent right of blockade, to which powers not recognised as great ones have now to submit—as the Chilian insurgents of 1891, who were not allowed to blockade Valparaiso and Iquique, though their belligerent right in respect of contraband of war was not disputed; and Japan, which was not allowed to blockade the treaty-ports of China. It will be difficult for him to resist the conviction that the tendencies are already in operation which in a remote future may crystallize into some form of international government. But the hint, though it may be given, is not one on which it would be useful to enlarge. In certain matters of politics it is easier to look forward a thousand years than fifty. By observing the point towards which the great streams of tendency in history converge, a glimpse may sometimes be obtained of a distant goal, but the route by which that goal will be reached will depend on those unpredictable combinations which we call chance. Your friend is in London; you have reason to believe that he is going to Edinburgh, but whether he will travel by York, Leeds, or Preston depends on circumstances in his affairs of which you are ignorant. The streams of tendency may be deflected in their course by obstacles which loom large for a time and then disappear in their turn. We may believe that a thousand years hence there will be a United States of Europe and a United States of all America, without pledging ourselves to the belief that that consummation will be sensibly nearer fifty years hence than it is now. Our duty in the interest of peace is to pursue it on the line which at present is that of least resistance, and that is certainly the promotion of international arbitration without demanding an organised security that the awards of arbitrators will be obeyed; in other words, without trying to convert international arbitration into international judicature.

2. *Arbitration contrasted with Mediation.*

Having thus cleared the ground for our subject on one side by contrasting arbitration with government, it will be well to clear it on another side by pointing out the difference between

arbitration and mediation. Arbitration is a proceeding in which a difference is referred, by the agreement of the parties, to the decision of one or more arbitrators. The agreement may be a special one made for the case, or it may be a general one for referring differences of a certain defined class, whenever such may arise between the parties, or it may be one for referring all differences which shall arise between the parties. The essential point is that the arbitrators are required to decide the difference—that is, to pronounce sentence on the question of right. To propose a compromise, or to recommend what they think best to be done, in the sense in which best is distinguished from most just, is not within their province, but is the province of a mediator.

Arbitrations may take place either between private persons in a state or between states. If the parties are private persons, the agreement by which they refer their difference to the arbitrators may be a binding one by the law of their state, so that, as the result of contract, the award of the arbitrators will be enforced as effectually as if it were the judgment of a court. When the parties are sovereign states, the sentence of the arbitrators will merely create a new right between them. Suppose that state A was in the right in the original difference, but that the award is given in favour of state B, the good faith of the arbitrators being unimpeachable, B now has a right by contract to have the award performed, though it cannot invoke any legal process for its enforcement. If B was also originally in the right, it has this new right added to its original claim.

Mediation also may take place either between private persons or between states, only in the former case the term would scarcely be used, because it is so simple for private persons to seek the advice of a common friend that a formal name is scarcely wanted for the proceeding. But between statesmen giving advice is a serious matter. Neither between private persons nor between states does a new right arise out of the advice given, but when a state commits itself to an opinion about what two other powers had best do, the hope arises on the one side and the fear on the other, or perhaps the fear on both sides, that it may interfere actively in support of its

opinion. Even if the state which has given the advice is so plainly without any interest in the question that its interference is not to be expected, still, the advice may add a moral weight to the side towards which it most leans, and moral weight is of great importance in the society of states, in which approval or disapproval has to find an outlet in any way that it can, for want of organised channels in which its pressure may be brought to bear. Hence, between states, trying to bring two parties together by any amicable means, even without passing sentence on the justice of their respective claims, is an important proceeding known by the technical name of mediation, or, in its less formal shape, by that of good offices.

We may now mark the position of international arbitration as a mean between mediation on the one hand, and the Great Design, or what Tennyson called "the parliament of man, the federation of the world," on the other hand. Unlike mediation, arbitration calls for a sentence; but, unlike the Great Design, arbitration, when international, calls for no enforcement of that sentence, trusting to the good sense and good feeling of the party against whom it is pronounced, and to the pressure of international opinion on him.

3. *General consent that there are limits to International Arbitration.*

Such being the nature of the subject with which we are concerned, the first question which meets us is whether the efforts of statesmen should be limited to promoting arbitration in every special instance to which it seems possible to apply it, or whether they should try to conclude general arbitration treaties, by which the states that may be parties to them shall agree to refer to arbitration either all their differences or all falling within a certain description. Here we encounter at the outset the fact that scarcely any one appears to think that the reference of all international differences to arbitration is possible. The Pan-American Congress of 1890 adopted a "Plan of Arbitration," of which article 4 ran thus: "The sole questions excepted from the provisions of the preceding articles are those which, in the judgment of any one of the nations

involved in the controversy, may imperil its independence, in which case for such nation arbitration shall be optional, but it shall be obligatory upon the adversary power." This plan received the votes of sixteen of the nineteen American republics, including the United States, the three wanting being Chili, Uruguay, and San Domingo. Similarly, M. Dreyfus, one of the latest and most enthusiastic supporters of arbitration, writes: "There are controversies to which there can be no obligation to apply it. When the independence or the integrity of a nation is at stake, all the treaties in the world could not force that nation to accept it[1]." Other writers add honour to independence and territorial integrity as excepting a difference from arbitration. It is true that treaties have been concluded by which states have pledged themselves to refer to arbitration all differences without exception, but so far as I am aware these have only been between Switzerland, Spain, or Belgium on the one side and American or African republics on the other side, and between Portugal and the Netherlands; all of them countries between which any difference falling within the principles of exception above noticed is so improbable that their governments might well think it unnecessary to be at the trouble of formulating a condition to meet such a case. We must then admit that, by general consent, there are some limits to international arbitration, and we have to ask whether it is possible to assign those limits in a treaty with sufficient clearness.

4. *Can the limits to International Arbitration be assigned?*

The word "independence," when used in this connection, is extremely vague. The independence of a nation is at stake, not only when the continuance of its separate existence as a nation is directly brought into question, nor even only when the question is one of reducing its limits so far as to make it difficult for the residue of the nation to maintain its separate existence. A state is injured in its independence whenever,

[1] *L'Arbitrage International*, par Ferdinand Dreyfus, avec une préface de Frédéric Passy, membre de l'Institut, Paris, 1892, p. 355.

without menacing its separate existence, it is hindered in doing or not doing anything that an independent state may justly do or abstain from doing. Such a case will never appear on the face of an arbitrator's sentence, because the sentence will always profess to follow the principles of justice in what it awards to be done or not to be done, but it will exist in fact whenever the sentence does not really follow the principles of justice. Therefore a clause in an arbitration treaty, by which a signatory state is allowed to refuse arbitration whenever in its judgment the controversy imperils its independence, will bear the interpretation that it may refuse arbitration whenever in its judgment a decision adverse to it would be so plainly unjust as to be an outrage to its independence. An exception, however, which was openly expressed to be of that width would go far to destroy the value of the treaty; while, on the other hand, if it should be meant to restrict the exception to cases in which the continued existence of the state as a separate member of the society of nations is thought to be imperilled, then, first, it should be distinctly so expressed, and, secondly, it is doubtful whether any two great powers would conclude a mutual arbitration treaty in which the exception was so restricted.

The word "honour," though as above mentioned it has been used by writers, need not be particularly considered. If any satisfactory definition could be reached of the outrage to independence which should exempt a difference from arbitration, that definition would cover all the cases in which the honour of a nation was so deeply at stake as to make arbitration impossible.

It is, perhaps, not difficult to perceive the idea which underlies all the limitations of arbitration that have been proposed. It turns on the distinction between legal and political questions. Legal questions are suitable for arbitration; political questions are in general not so. But the terms "legal" and "political," though they would probably be found intelligible enough for practical purposes, are not suitable for use in a treaty, seeing that they are not technical terms of international law recognised in diplomacy for the purpose of expressing a distinction. It will be worth our while to analyse the distinction which they are suggested for expressing, and if

the analysis should not result in hitting on language which might be used in a treaty, it will at least clear our views on the subject.

By a legal difference between states, one is meant which can be settled by reference to known rules, having at their back that force which is derived from the general consent of the international society. We have nothing here to do with the circumstance that the force referred to, though very real, is unorganised, and therefore irregular in its action. Having agreed, as students of international arbitration and not of international government, to dismiss the question of enforcing awards, we have nothing to do with the mode of action of the force in question. We have only to do with the existence, in favour of each particular rule, of the consent from which the force arises. The rules which must govern a difference between states, in order that it may properly be described as a legal difference, must be known and generally consented to as the ground of international action, whatever form that action may take. This may be illustrated by examples.

An arbitration is now pending between Great Britain and the Netherlands, the distinguished Russian jurist, M. Fr. de Martens, being the arbitrator, in which damages are claimed for Carpenter, the captain of an Australian ship, the "Costa Rica Packet," by reason of his arrest in the Dutch East Indies and the mode in which he was dealt with there by the Dutch courts. Here the award must turn on the questions whether the Dutch authorities had jurisdiction in the case, and whether they exercised their jurisdiction in substantial conformity with the practice of civilised nations. International law is clear that the claim must fail if these questions are answered in the affirmative, and all that will be required, beyond the ascertainment of the facts, is therefore Dutch law and a moderate dose of comparative jurisprudence. No case could more clearly be suitable for arbitration.

Next let us consider the recent Behring Sea arbitration. No part of international law is better settled than the rules for the exercise of authority in time of peace on the high seas, and the conditions under which any part of the sea can be claimed by a state as being within its exclusive sovereignty are equally

clear, subject to some question of measure in cases near the border-line of right, which did not arise with regard to the Behring Sea, and which, if it had arisen, would have fallen as reasonably within the discretion of an arbitrator as certain questions of measure in applying the principles of national law fall within the discretion of a judge. Here therefore was another legal difference marked out for arbitration by its nature, though the rules to be applied were exclusively those of international law.

Now pass to the famous "Alabama" arbitration. Here there had been a divergence of opinion between Great Britain and the United States as to the international rules with regard to the conduct required from neutrals in war, and so long as that divergence continued the question was not one for arbitration, unless any one will contend that arbitrators should be intrusted with the power of fixing doubtful law, as to which more will be said later. At any rate, the divergence in question made it impossible to settle the difference between the countries by rules known and consented to, and so prevented its being what is here called a legal difference. But as soon as the parties agreed on the Three Rules as applicable to the case, it only remained to apply those rules to the facts; in other words, the difference became a legal one and suitable for arbitration.

As an example of a political difference we may take the following: By the treaty of Paris, which England and France imposed on Russia in 1856, at the close of the Crimean war, the Black Sea was neutralised, and Russia and Turkey engaged not to maintain or establish any maritime arsenal on its coast. Experience has not shown that such limitations of what a great power may do within its own territory can be permanently upheld, however their imposition may suit the circumstances of a given moment; but where, as in this case, the treaty does not fix a term for its duration, the lapse of time or the change of circumstances that may give a claim for its rescission is quite indefinite. The claim to rescission depends on the political configuration of the world. How far have the dangers ceased to exist against which the limitation was intended to provide? And in answering this it must be remembered that not only the

might of the different powers has to be looked to, but also their respective policies and designs. Again, if the dangers against which the limitation was intended to provide have not ceased to exist, it may still be asked whether the limitation is any longer the wisest method of providing against them, whether the attempt to perpetuate it would not cause greater dangers in the actual political configuration. These are questions which elude all definition by rules. In 1871, Russia, taking advantage of the disablement of France, denounced the clauses which were obnoxious to her and proceeded to re-establish her arsenal at Sebastopol. The opinion was widely, perhaps generally, entertained in England that Russia had no fair claim so to act, but it was beyond the strength of any single power to maintain the clauses. A conference was assembled, a verbal tribute was paid to the binding character of treaties, and the limitations were removed by consent. Now, suppose that France had not been disabled, and had concurred with England in thinking that the Black Sea clauses of 1856 ought to be maintained, could such a difference between those powers and Russia have been referred to arbitration? An arbitrator must have said that from a legal point of view, which was the only one he could entertain, there were not two sides to the question; that it was past all doubt that a state cannot by a unilateral act put an end to a stipulation it had signed. But would any great power have been content for the political question to be so disposed of? Clearly not. As little would Parliament be content to be prevented from modifying contracts on the ground of public policy by the declaration of a judge, true as it would be, that a party cannot free himself single-handed from a contract. Till "the parliament of man" becomes a fact, powers have to do for themselves what parliaments do for private persons. The case supposed would have been one in which the claim for relief would not have been repugnant on its face to the principles of international law. Almost all theorists on the subject agree that the tacit but undefined condition, *rebus sic stantibus*, is attached to treaties. Even in England, thinkers like J. S. Mill approved the claim of Russia to relief. But the claim did not admit of being put in a legal shape, because the appreciation of the circumstances on which its true

value depended could not be reduced to rule, but was a question for statesmen.

Two objections may be anticipated to what has just been said. One will come from those who desire that every international difference shall be settled on what have been here distinguished as legal grounds—that is, by rules known and consented to. They would condemn all international action which could not show such a ground, and respect the existence of every legally existing arrangement for the alteration of which the approval of every state concerned could not be obtained. But not much time need be spent in repudiating a view of international duty which, for example, would condemn all interference on behalf of the Armenians or the Cretans, because it is impossible to qualify the independence of the Sultan or of any other power by legal definition.

The other objection will take this shape. It will be admitted that arbitration, strictly speaking, is a proceeding for obtaining a sentence on the legal right or wrong of a dispute. But it will be said that that is not what was meant in advocating arbitration as capable of being resorted to in all international differences. It will be said that every international difference can and ought to be referred to some one with power to settle it in one way or another; on legal grounds if such can be found and are satisfactory; if not, then on all the grounds which would be open to statesmen in dealing with the case. The arbitrator is to be both judge and, if need be, legislator. He is to combine the offices of arbitrator and mediator, with the addition that when in the latter character he proposes a solution not as what is legally just, but as what is best, his proposal shall have what the advice of a mediator has not, the same force as the award of an arbitrator, binding the parties and creating a new right between them. But this objection is not more practical than the other. It is very likely that in some cases of no great importance two nations may by special agreement create over themselves a jurisdiction of so far-reaching a character, but it is not to be imagined that any nation should in advance surrender its destiny to such a jurisdiction by a general treaty.

5. *Conclusions from the foregoing.*

The foregoing considerations may lead us to the following conclusions:

International arbitration is not a proceeding that can ever be applicable to all international differences, and some reservation must therefore be contained in every general arbitration treaty.

It is difficult to describe the cases which are intended to be reserved by any terms which the negotiators of general arbitration treaties could trust to be understood in any precise sense, though some help may probably be given by well-chosen words. Even the danger to independence, which the Pan-American plan gives as the only reason for declining arbitration, may be a useful expression to employ, though it will not bear defining further. The reservation, in whatever terms it may be couched, must leave it substantially to the parties to decline the application of the treaty whenever they think it necessary to do so.

But the nature of the cases which will not admit of arbitration is clear enough, both from the reason of the thing and from the experience of arbitrations which has been gained, to make it probable that between parties of good faith there will be little difference of opinion as to the applicability of the remedy in particular cases. Therefore between such parties the employment of loose words to express the reservation will probably not do much harm. On the other hand, every refusal to apply a general arbitration treaty in a case in which it ought to be applied will embitter the original difference by adding a charge of bad faith to the original cause of difference. It will therefore be best to abstain from concluding general arbitration treaties except between states which can count on one another to work them in good faith.

I believe that Great Britain and the United States are nations between which a general arbitration treaty may usefully be concluded, provided that it be concluded, not under the impression that any treaties can be panaceas for international differences, but after such discussion as may enlighten both nations about the reality and meaning of the reservation which the treaty will have to contain.

6. *Should all questions of Law be referred to Arbitration?*

The cases for international arbitration have been described as legal ones, without pretending to scientific accuracy, but it is hoped with some practical degree of clearness. On this it may be asked whether, even where law is concerned, it is proper to intrust arbitrators with an unlimited power of declaring it. Where the law is so openly a matter of controversy that that controversy is a principal part of the difference to be settled, in which case the difference is not a legal one in the sense of calling only for the application of known and admitted rules, it is scarcely possible to regard an arbitration as a proper means of declaring the law. International jurists of any eminence will almost certainly be known to lean to one side of the question or the other, and will therefore be unacceptable as arbitrators. Other jurists, and even judges of state courts who are not eminent international lawyers, would not be considered qualified to take what would be a great step towards legislating for the world on subjects with which they are not conversant. Crowned heads and statesmen, accustomed to weigh such questions, and acquainted by experience with their ramifications and bearings, are the class by whose judgment the disputed rule will in the main be ultimately fixed; but this will only be by their judgment as a class, when time and the varying circumstances of different occasions have eliminated transient bias. Impartial and wise members of that class are difficult to find on each particular occasion. The best, and perhaps the only, way in which cases of disputed international law can be submitted to arbitration is that which was adopted in the "Alabama" case—namely by the parties agreeing, if possible, on rules to be applied *pro hac vice*, leaving those rules to make their way in the world afterwards or not, according to their merit.

But another case may arise. The international rules to be applied may be well known and generally consented to by civilised mankind, and the claim of one party may have been brought forward in defiance of them. Is it a duty of the other party to submit to an arbitration on such a claim? Demands made in open defiance of law are common enough in private life, and are sometimes pushed as far as into the courts of justice,

which in that event have the means of dealing with them quickly and sharply enough. They cannot be excluded from the courts, and the protection which private persons enjoy from the law of the land compensates them for the occasional annoyance which arises from the courts being open to all. But the law of nations, wanting as it is in organised instruments, confers no equal protection. Is it therefore always a sufficient argument as between states, "if your case is so clear, trust it to an arbitration"? This is a very important question, both as to the use which a state may properly make of the liberty reserved to it in a general arbitration treaty, and as to the propriety of refusing an arbitration in the absence of such a treaty. An illustration will best enable it to be understood, and one is unhappily at hand.

In the difference now pending between Great Britain and Venezuela as to their boundary in Guiana, the Venezuela case avowedly comprises the following points: I do not say that it rests on them, for we are not here concerned to enquire what other points it may comprise. It is alleged (1) that the whole of Guiana came under the sovereignty of Spain by means of a papal grant and of discovery; (2) that the effect of these titles in conferring sovereignty was not and is not limited by possession in fact, wherefore the Dutch could not advance by settlement, even over unoccupied territory, beyond the limits within which Spain recognised them by the treaty of Munster in 1648, while the Spaniards were free to extend their settlements beyond the limits which they had then reached; and (3) that, on questions of territorial sovereignty, international law admits no prescription but an immemorial one. Now, international prescription, short of being immemorial, is admitted in principle by the great majority of jurists: no term of years has been fixed for it, and the necessary term may well vary with the circumstances, and be left to the decision of arbitrators if the principle be conceded. And the doctrines put forward by Venezuela concerning the papal grant and discovery without possession had been denied by Queen Elizabeth as early as 1580; the American colonies of England, past and present, had been built on their denial; they are not maintained by any school of jurists; and the King of Spain had placed himself on much

narrower ground during the Nootka Sound controversy in 1790. In these circumstances it appeared to me that the doctrines adduced were frivolous, but that the demand for an arbitration on them was supported in a manner which might make mere frivolity serious. I accordingly wrote (London *Times* of 10th February, 1896) that it did not lie in the mouth of any nation to say that its claim was reasonable enough for it to be entitled to an arbitration on it, and at the same time that the other party might feel secure of the arbitrators rejecting it. And I recommended that England, by a proceeding similar to that of the United States in the "Alabama" case, should make it the condition of an arbitration that certain rules of law relating to the title to territory should be laid down to guide the arbitrators, or else should limit an arbitration to such part of the territorial claim of Venezuela as did not plainly depend on the inadmissible doctrines.

My opinion on the particular case which has been mentioned may have been sound or otherwise. But in an article on international arbitration it would be impossible to pass over the point that a self-respecting nation can scarcely be called on to discuss before arbitrators doctrines which cannot be denied without impertinently calling in question its own history and the general judgment of the world.

7. *The Use of Mediation.*

Where the difference between two states is what has been roughly described as a political one, or where for any other reason an arbitration is impossible, it is a plain duty to seek the good offices or mediation of friendly powers. It is very unfortunate that this is so rarely done, at least in circumstances promising success to the remedy. Thus, the plenipotentiaries assembled at the Congress of Paris in 1856 recorded in their protocols the wish that states, "before appealing to arms, should have recourse, as far as circumstances may allow, to the good offices of a friendly power"; and in the treaty which they concluded it was stipulated that, before the employment of force between Turkey and any of the other contracting parties, an opportunity should be afforded of preventing such an extremity by the mediation of the other contracting parties.

Turkey appealed to this stipulation in 1877, as an answer to the declaration of war against her by Russia, after all the circumstances had been the subject of prolonged discussion between her and the great Christian powers, whose united demands she had refused; and the appeal was naturally in vain. Though Russia alone was in arms, it was Christian Europe with which Turkey was in difference, and her appeal for mediation was substantially an appeal to her opponents to abandon, and to induce Russia to abandon, a part of their exigencies. If, in pursuance of the wish expressed by the plenipotentiaries of 1856, France and Prussia, in 1870, had invoked the mediation of the powers which were not concerned in their difference, there can be no doubt that means might have been found to save the honour of each country without a resort to war.

It may be further observed that there is a class of cases in which mediation might usefully be combined with arbitration —namely, where a difference which calls for the application of legal rules can nevertheless not be entirely disposed of by such rules. For instance, suppose that in a boundary dispute referred to arbitration it appeared that there was some territory to which neither party could establish a title in accordance with the acknowledged rules of international law. It would be desirable that the arbitrator, after awarding to each party all that it could lawfully claim, should possess the power of a mediator to propose a division of what remained. And he might be clothed with that power by special agreement, where the possibility that occasion might arise for its exercise could be foreseen. I proposed that this course should be taken in the difference between Great Britain and Venezuela, considering that, after due effect had been given to possession and prescription, there might remain forests untrodden by civilised men to which no legal title could be made out (London *Times*, January 6, 1896).

8. *General Conclusion.*

It now only remains to impress on all whom this article may reach the duty of promoting international arbitration. To the statesmen who are believed to be engaged in negotiating

some general arbitration treaty between Great Britain and the United States, it is only possible to wish Godspeed. Those who are not engaged in such a task can more usefully occupy themselves with ideas than with plans: too little can be known from the outside of the mental attitude of those who are concerned in negotiating the treaty, or who will be chiefly concerned in working it if concluded, what difficulties may appear to them the most formidable, and what amount of goodwill and flexibility can be relied on for overcoming in practice difficulties that look formidable on paper. And after all, a treaty of which the philanthropic provisions can only be concluded or applied with reservation bears a resemblance to those formal promises of amendment of which the moral value to a sinner depends on at least an attempt being made to carry them honestly into effect. Without such an attempt, the idle words may scarcely have even the negative merit of insignificance which may be predicated of the Paris protocol in favour of mediation, they may lull the conscience to sleep and discredit a good cause. What is wanted is actually to have an arbitration on every international difference which can be brought to admit of it, whether by application of a general arbitration treaty, if there should be such a treaty between the parties, or by special arrangement for the case. Every actual instance confirms the habit: it secures peace on the occasion, and makes it more likely that peace will be secured on future occasions.

I spoke just now, advisedly, of international differences which can be brought to admit of arbitration. The great number of international arbitrations which there have been in recent years is sometimes paraded as though we were in the presence of the beginning of a process which only had to be continued in order to lead of itself to all but universal arbitration. There is some truth in that view, but there is also another side of the facts. Arbitration is already applied between states to almost every difference which appears on the face of it to fall within the category which has been roughly described as legal. Those are not the differences out of which it need now be seriously apprehended that wars will arise. What is wanted is earnest effort to bring more or less within the range of arbitration differences which do not at first sight admit of it. It

should be considered on each such occasion whether some part of the difference does not admit of arbitration; whether, as to the rest, the powers of a mediator might not be given to the arbitrator; whether, if unlimited arbitration be impossible, it may not be possible to fence a reference by conditions securing the honour of the parties, and those real and great interests which they must not allow to be imperilled. If it should be found practicable to bring the parties together for the quasi-judicial discussion of any points before arbitrators, so much will have been withdrawn from the dangerous part of the case, and their temper for the diplomatic discussion of the remainder will probably have been improved. Shall I go further, and say that even some questions of politics and honour, questions affecting independence in the large and true meaning of the term, may be referred to arbitrators? to persons from whom, as from ordinary arbitrators, a sentence binding the parties should be required, although it cannot be given on legal grounds? It is possible that this may be so, where the questions are not of vital importance, and where the arbitrators are carefully chosen with a view to the special nature of the difference. But to extend the practicable bounds of arbitration in the ways indicated would be something more than to continue a process which can as yet be pronounced to be working, and will demand the active and intelligent co-operation of statesmen and of public opinion on each available occasion.

But for the encouragement of the lovers of peace it may be said that from various causes, some of which have been touched on above, international arbitration is in the air. When this happens to an idea, and as long as it continues to be the case, the power of the idea for good cannot be measured by logic, necessary as it is that we should do our best to understand the conditions in order to work with them. It is the season to raise our hopes, and do our utmost to try what the idea of international arbitration can accomplish.

J. WESTLAKE.

July 2, 1896.

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INTERNATIONAL LAW

PART II

WAR

by

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J. WESTLAKE.

February 1913.

PREFACE TO THE FIRST EDITION.

AMONG the causes which have retarded this sequel to the volume of 1904—*International Law*, *Part I*, *Peace*—the two principal have been, first, the necessity of bringing out a new edition of my *Private International Law*, and secondly, the imminence of a second Hague Conference, certain to produce important discussions and likely to produce notable amendments of the laws of war. Although the Conference is still sitting while I write, it is now possible to give an account of its work on the laws of war. Obligatory arbitration, a permanent court of arbitration, the Drago doctrine and the limitation of armaments belong to the laws of peace.

Time was gained by printing, before the meeting of the Conference, most of what it was desired to say on the law as it

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stood, a little however being reserved for treatment in connection with the Conference. In consequence it will be necessary, in order to obtain a complete view of many subjects, to refer as well to the last chapter, in which the proceedings at the Hague are dealt with, as to the former portions of the volume. Perhaps however the balance of convenience is on the side of keeping the old law distinct from discussions and amendments the full effect of which, and even to some extent their general acceptance, time will be required to appreciate.

In reviewing the laws of war for the purpose of this volume, I have been more than ever struck with the differences which exist as to their principles. It is hoped that those differences have been presented and their history sketched without exaggeration or extenuation. One point which it may be worth while to notice here is the author's conviction that the common representation, according to which England early accepted from the Consolat del Mar the immunity of neutral goods in enemy ships, cannot survive Mr Marsden's publication of the *Select Pleas of the Court of Admiralty* for the Selden Society and his *Six Centuries of the Admiralty Court.* See pages 123–127 of the present volume [140–3 of the Second Edition].

J. WESTLAKE.

October 1907.

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ERRATA AND ADDENDA.

Page 86, middle paragraph: To avoid misconception as to the extent to which Great Britain is bound by the convention which contains the famous Art. 23 (*h*), supposing that Article to prohibit with full generality the denial to enemies of a *persona standi in judicio*, it must be pointed out that such denial, being a part of the law of England affecting private rights, cannot be effaced from that law by a treaty. An act of parliament would be needed for the purpose. The king, as head of the executive, can bind himself by a treaty to instruct the commanders of his armies not to apply such denial in foreign places occupied by them; and this I am of opinion that he has done, if ever it should be possible for the occasion to arise in an occupation. See an article by me—*Is International Law a part of the Law of England?*—22 *Law Quarterly Review*, pp. 14, 26.

Page 116, line 10: for "Spanish" read "Danish."

,, 121, line 10: for "153" read "160."

Pages 295, 296. The Declaration of London, Art. 57, leaves undecided the case of a neutral ship engaging in a trade closed in time of peace, whether, apparently, she does so by special license or under a general opening of the trade not meant to be permanent.

The revision of the present edition and the necessary additions to it were made by the author shortly before his death.

CHAPTER I.

WAR AND FORCIBLE MEASURES SHORT OF WAR.

Definition of War.

For the redress of wrongs or the prosecution of claims states may appeal to force either by war or by certain measures—reprisals, embargo or pacific blockade—not inconsistent with peace. The consideration of measures of the latter class will naturally precede the detailed consideration of war, as being more akin to the subject of the preceding volume, but first of all war must be defined or those measures could not be distinguished from it. The definition of war given by Grotius was *status per vim certantium qua tales sunt* (1. 1. 2. 1), which includes, as he intended it should, private quarrels waged by force. But it may well be doubted whether a term becomes more useful by being made so comprehensive, nor does the common employment of the word "war" now extend so far, whatever may have been the case three centuries ago as to *bellum*. We therefore, accepting the definition of Grotius in other respects, will say that *war is the state or condition of governments contending by force*. Governments are here mentioned and not states, because the laws of war belong equally to insurgents not yet recognised as a state but recognised as having belligerent rights, which they could not be if they did not possess a government. Whether and how far individuals can be treated as parties to a war is a question to be discussed in the sequel, and is not prejudiced by the use of the word "government," as indeed it would not have been by the use of the word "state":

if they are treated as parties to a war, that can only be justly done when there is reason for their being identified with their state or government.

The important point of the definition is that war is a state or condition: *non actio sed status eo nomine indicatur* says Grotius (u. s.). As such war is not set up by any mere act of force, whether an act of reprisal, embargo or pacific blockade, or an act of self-defence, or one of unlawful violence. It can be set up only by the will to do so, but that will may be unilateral because the state of peace requires the concurrent wills of two governments to live together in it, and is replaced by the state of war as soon as one of those wills is withdrawn. How the will to set up war may be manifested is a question which we shall have to consider: here attention is called to the fact that acts of force are not war unless either a government does them with the intent of war or the government against which they are done elects to treat them as war. Thus, for example, a pacific blockade may continue long and come to an end without there ever having been war.

It may serve to make our thoughts still clearer if with Grotius's definition of war we contrast an earlier and a later one, both due to writers of great distinction. Albericus Gentilis said that *bellum est publicorum armorum justa contentio: de Jure Belli*, l. 1, c. 2. This does not bring out the cardinal point that war is a state or condition. Also, although the word *publicorum* admits of the meaning necessary to make the definition correct, it would seem that Gentilis regarded it as not war but treason if insurgents not constitutionally having *imperium* fight against their prince (l. 1, c. 3). The truth is that a great insurrection with a real government at its head may have both characters. It will be war for the purpose of the neutrality of the powers which recognise the insurgents as having belligerent rights, and even the government against which it is directed may and ought, for the sake of humanity, to treat it as war while the struggle continues, though if and when it has been put down the internal law of that government will not thereby be prevented from regarding it as treason. Lastly, to define war as a *justa contentio* is correct in the sense in which *justum* means *plenitudo quædam*, the satisfaction of certain requirements,

as in *justæ nuptiæ*, *justa ætas*; and in fact the common phrase *justum bellum* means only a regular war. Yet although Gentilis gets a glimpse of this (l. 1, c. 2), he does not hold firmly by it as his contemporary Ayala did, but, taking *justum* in the popular sense of consonant with justice, accounts for a war being entitled on both sides to that appellation by there being generally a show of justice on each side, and by the mean in which justice consists being not a point but a space possessing breadth, within which room may be found for each party though one is more just than the other (l. 1, c. 6).

The second writer above referred to is Bynkershoek, who says *bellum est eorum qui suæ potestatis sunt juris sui persequendi causa concertatio per vim vel dolum: Observationes Juris Publici*, l. 1, c. 1. Here the sure touch of Grotius is wanting. The character of a state or condition, which when once it had been pointed out ought not to have been forgotten, is omitted, and the mention of *dolus*, which often accompanies force but is neither a necessary nor alone a sufficient ingredient in the constitution of war, gives to the sentence the character of a description rather than a definition. *Juris sui* must be understood and was doubtless intended to include a claim, whether in accordance with *jus* or not.

The Relation of War to International Law.

International law did not institute war, which it found already existing, but regulates it with a view to its greater humanity. War is a piece of savage nature partially reclaimed, and fitted out for the purpose of such reclamation with legal effects, such as the abrogation or suspension of treaties, and legal restrictions, such as what are called the laws of war and neutrality. No force is used in war by agents having an international character, as force is used by agents having a public character in order to secure obedience to the law of the land. That war is often waged by powers which have allied themselves for the purpose by international compacts is no exception to this. If an international government were to arise, either by the authority of the great powers growing into a definite and recognised system or by any other means, the employment of

force by such government would be comparable to its employment by the ministers of justice within a state. But that consummation is still far off, and until it shall be reached war cannot be described as an execution. Neither to the claims which furnish the reason or the pretext for war, nor to international law so far as it may pronounce such claims to be just, does war stand in the same relation in which an execution stands to the claim of a plaintiff or to the law of the land under which it is put forward. An attempt is sometimes made to determine in the name of international law the conditions on which a recourse may be had to arms, as that an offer of submitting to arbitration shall have been made, where the case is not one of those supreme ones for which it is generally considered that arbitration is unsuitable. No doubt that is the counsel of morality, and so too is it that much shall be borne rather than that war shall be begun for a slight though just cause, even when there is no other recourse. But these are not rules of law, for they are totally lacking in precision, the principles which they express receive nothing approaching to general observance, and the legal character of a war is the same whether they have been observed or not. The truth is that when war enters on the scene all law that was previously concerned with the dispute retires, and a new law steps in, directed only to secure fair and not too inhuman fighting. This, like the law which during the contest it replaces, consists of rules having the general approval of the society of nations and more or less enforced by the irregular action of that society; but there are great differences in the efficacy of the enforcement.

The rules which lay down the conduct to be observed by neutrals during a war are among those in the elaboration and enforcement of which the action of the society of nations is the most influential. "Let war break out between two powers, and the whole non-belligerent world is at once related to that war as neutral, its political and commercial interests are affected by the views entertained about the mutual rights and duties of neutrals and belligerents, incidents occur which oblige even the remotest state to act on some view about those rights and duties, and a general vigilance is aroused not only as to the observance but even as to the shaping of the rules on the subject." Even what

in those circumstances neutrals tolerate on the part of belligerents without expressly sanctioning it easily tends to become clothed with the character of law. But the rules which lay down the mutual rights and duties of belligerents present the action of the society of nations at a low level. "A belligerent may complain that his enemy has violated the laws of war, he may use measures of retorsion, but the discussion which so arises is seldom brought to any clear decision. The victory of one party, or such balance of power as may be reached between the parties, brings to a single comprehensive close the war and every thing connected with it, the disputes which led to the war, the ulterior aims which have been developed in its course, and the recriminations to which its incidents have given rise. In drawing up the treaty of peace what is thought of is the new departure in the relations of the parties," including third powers which may have intervened or made their pressure felt for political reasons—such interference on the ground of the misdeeds of a belligerent in the conduct of the war is scarcely known. "Resentment at an act which he deems to have been a violation of the laws of war may swell the indemnity demanded by the conqueror, but the amount added on that score cannot be distinguished, the vanquished pay the indemnity without admitting the violation, and if they condemn the conduct of the war by the conqueror their remonstrances remain wholly without effect. When in a subsequent war the temptation arises to repeat an act the lawfulness of which has been questioned in a previous war, the records of the latter furnish no pronouncement on its lawfulness which can be appealed to[1]." Since this was written the work of the Hague Conferences of 1899 and 1907 has marked a great advance in the part taken by the society of nations in shaping the laws of war, but the small part which it takes in their enforcement remains open to the same criticism. If on the other hand, with regard to the laws of war, general opinion has less external support than in other parts of international law, it speaks with more authority when it imposes restrictions on violence in the names of humanity and conscience.

[1] The quotations in this paragraph are from *Chapters on the Principles of International Law*, 1894, pp. 232–4.

Reprisals and Embargo.

In the literature of international law there are for modes of self-help several terms which are not always carefully distinguished. The widest is retorsion, which applies whenever action is taken by a state in order to compensate it for some damage suffered through the action of another state, or in order to deter the latter from continuing the action complained of. There may be no breach of law on either side, as when state *A* imposes custom duties which do not contravene any treaty, and state *B*, which believes its interests to be damaged by them, imposes by way of retorsion custom duties from which it also is not debarred by any treaty. These however are matters of policy. As a matter of law there is retorsion when state *A* deems that it has received from state *B* not merely damage but legal injury, exempting it from the duty of a strict observance of law towards the wrongdoer, and replies by another breach of law intended to be compensatory or deterrent. In time of peace such retorsion is not generally justifiable in the forum of conscience unless the complaining state has obtained in its favour the sentence of a court of arbitration, or there are no means of submitting the complaint to arbitration. There may be exceptional cases, as where there is reason to expect that a slight and very clear wrong may be remedied by a not very serious counter wrong, with less expenditure of time and trouble than an arbitration would require; or where, the wrong complained of being greater and very clear, retorsion may fairly be employed concurrently with a demand for arbitration. Such exceptions are especially likely to occur where the complaint is that some provision of a treaty has not been observed, and the retorsion consists in not observing some other provision of that treaty or of another treaty between the same states; but there can be no doubt that in the regular course of things remedies should be sought in arbitration before they are sought in self-help.

Another of the ill distinguished terms to which we have referred is retaliation, which is often used in the wide sense of retorsion of any kind, but is perhaps more properly used only for that kind of retorsion in which the thing done in return is the same as that complained of. "An eye for an eye" is retaliation,

but that term would hardly be used of imprisonment for injury to an eye. Thus in war, breaking towards an enemy the particular rule of civilised warfare which you accuse him of breaking would be retaliation, while breaking another rule towards him would best be described as retorsion. And the non-observance of a treaty in one clause in return for its non-observance in another clause might well be called retaliation, the treaty being the same.

Reprisal is another of the terms referred to. Its etymology gives the sense of "taking in return," and its original use was in the plural (reprisals, *repressalia*) as denoting a certain systematised taking by way of self-help which will presently be explained. From that sense it has come to be used in cases where there is no taking because the thing is already in the hands of the power seeking redress, as in that of Frederick the Great's withholding the interest on the Silesian loan in retorsion for what he alleged to be the unjust condemnation of Prussian vessels in English prize courts; and occasionally even still more widely, as equivalent to retorsion generally. But it is not retorsion generally, or even reprisal in the sense of withholding a payment or not observing a treaty provision, that we have to do with in this place. We are not here concerned with self-help in any other form than that of acts of force, because it is only those that are liable to be confused with war. And even among acts of force in time of peace our only concern is with certain classes of them which from various causes have been systematised, and that in modes which make their confusion with war difficult to avoid, although their difference from it cannot be overlooked without undermining the definition of war as a state or condition. Take such an act of force as Russia's occupying the Danubian provinces of Turkey in 1853, with the view of holding them as what she called a material guarantee. We shall see in its place that such an act is not necessarily one of war, but it does not belong to the classified and systematised acts now to be considered.

Reprisals, as a forcible measure employed by states in time of peace, may be defined as the taking possession, at sea or on land, of the ships or other property of a foreign state or its subjects, with a view either to pressure on that state for the

redress of a wrong alleged to have been done by it or by one of its subjects, or to the application of such property in compensation of such alleged wrong.

Embargo, as a forcible measure employed by states in time of peace, is a special case of reprisals as above defined, being the detention of such property as mentioned, usually ships in the ports of the embargoing state, with such view as mentioned. Thus embargo, and reprisals in the special sense in which they are contrasted with it, differ as detention from capture; but when the property embargoed is applied in compensation it is reprisal, and the two terms are not carefully distinguished in practice.

Reprisals (*repressalia*) were based on the solidarity which according to ancient views, still far from having ceased to operate, existed between a prince and his subjects or between a city and its citizens. A wrong done by any of them to a foreign prince, city or person was the wrong of all, and all were answerable for it; the cause of any of them who had suffered a wrong from a foreign prince, city or person was the cause of all, and often in practice all took it up, though perhaps in theory it was only for the wronged one or his prince or city to do so. Together with this there worked another mediæval principle, that of self-help as the primary mode of redress. Even in England the history of our law teaches us that civil procedure at first rather came in aid of self-help than was looked on as being in itself the proper and whole remedy. It is necessary to dwell on this aspect of the case because it must not be supposed that the difference between self-help against the foreigner and war was not well known in the middle ages. War was entered on by *diffidatio*, defiance, severing the tie of faith between him who sent it and him who received it; and this not merely between superior and inferior, in order to discharge the feudal duty of either to the other, but between equals. That tie being severed, the *diffidatio* set up a new relation between the parties, just as we still recognise that of war to be. But self-help neither required nor implied a severance of the tie of faith.

That a person who had a grievance against a foreigner should capture ships and cargoes belonging to him, or to those whom general opinion regarded as being solidary with him, was no

more deemed shocking or exceptional in a state of peace, than a man's forcibly retaking his goods from a neighbour who had despoiled him of them was deemed to be inconsistent with the internal peace of a country. Nay, that he should capture and detain the persons of the fellow subjects or fellow citizens of his alleged debtor—for to that extent reprisals went—was a natural conclusion from the principles of solidarity and self-help, applied when imprisonment was deemed the natural remedy for debt.

At least as early as the thirteenth century, however, the practice of reprisals was restrained by the conditions that the license of the self-helper's sovereign was to be first obtained, and that property captured at sea could not be appropriated without a sentence of the admiral. The license was granted by letters of marque or of reprisal, or of marque and reprisal. The former term has been connected by some with *marca*, a boundary, the letters being an authority to make captures outside the boundary of the territory; but it may be derived much more easily from *marcare* or *marchiare*, words which are found in documents of the thirteenth century in connection with *pignorare*, apparently in the sense of marking goods for a claimant's security. If the prince on the other side considered the claim to be unfounded, or the compensation obtained to be excessive, he issued letters of *contre-marque*. The measures which a subject was thus licensed to take for his own redress were called special reprisals. General reprisals were resorted to by princes in pursuance of their own claims, political or pecuniary, or for the redress of their subjects' griefs when they adopted them. The proclamation of general reprisals ordered the subjects to capture the property of the other prince and the persons and property of his subjects, and although not confined to the case of war they became a regular accompaniment of war. In either case they were usually coupled with an embargo on the ships of the other prince or of his subjects which were in the ports of the prince resorting to the measure.

Of all this little now remains. Special reprisals are entirely obsolete: the injured individual is no longer entrusted with his own redress. The liability of enemy property to capture at sea during war, which is still maintained by Great Britain and some other countries, is a survival from the system of general reprisals,

but, privateering being abolished, it is enforced only by ships of the national navy. Embargoes and captures at sea even by the national navy, by way of reprisal without there being a state of war at the time, were held by Lord Stowell to justify condemnation of the property seized when war followed, in which case he allowed its outbreak to operate retrospectively[1]—a weaker reason, as Hall observes, than the hostile character which belongs to the property at the time of its condemnation. That decision does not expressly either affirm or deny the right of appropriating the captured or embargoed property to the redress of the wrong complained of, if a long time elapses without the claim being admitted, although war may not have broken out; and the Institute of International Law has expressly affirmed that right[2]. But at least Lord Stowell left untouched the capture or detention of the ships of a foreign government or its subjects as a means of putting pressure on it, whether or not he considered that redress could be reached by their appropriation so long as peace is preserved. This means was employed by the British government in its dispute with Naples about the Sicilian sulphur monopoly in 1840, which was settled without war through the mediation of France, and the ships which had been captured or embargoed were then set free. And the method continues to be applied in substance, though under the name of pacific blockade. Lastly, when a war has not been led up to by reprisals, embargo or pacific blockade, the practice of laying an embargo at its outbreak on ships which find themselves in ports becoming those of an enemy has given way to the practice, now general, of allowing time for the departure of such ships. But when forcible steps taken in time of peace fail to bring about a

[1] *The Boedes Lust*, 1803, 5 C. Rob. 245. The case was one of embargo in a port, but it cannot in our opinion be distinguished in principle from one of capture at sea.

[2] Art. 38 of the *Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers*, 17 *Annuaire* (1898), p. 284. Hall seems to regard Lord Stowell as denying the right to appropriate embargoed property in any case except that of war breaking out, but says: "It is not necessary that vessels or other property seized otherwise than by way of embargo should be treated in a similar manner. They may be confiscated so soon as it appears that their mere seizure will not constrain the wrong-doing state to give proper redress": § 120. See note 2, p. 17.

settlement, they would be stultified if ships detained under them were allowed to depart on the outbreak of the war into which they develop.

Pacific Blockade.

We must here assume that the reader knows enough of the laws of war to be aware that under the name of blockade a belligerent is entitled to cut off all communication by sea with a port or coast of his enemy, whether by his own or enemy subjects or even by neutrals, and to capture and confiscate blockade-runners, the conditions being that his blockade shall be properly notified and shall be substantially effective. In the first half of the nineteenth century the idea occurred that this proceeding might be imported into the laws of peace, the right to make reprisals, as to the propriety of which in the absence of war the general conscience was becoming sensitive, being reinforced by declaring a blockade of the ports or coast off which they took place. Thus a state of quasi-war would arise, to the exigencies of which quasi-neutrals might be required to submit as neutrals submit to those of war; the pressure on the quasi-enemy would be increased by including the quasi-neutrals among those with whom his communication was cut off; and a doubt as to the right to condemn his ships under the law relating to reprisals, instead of only sequestering them to await the pacific or hostile close of the incident, would become less obvious if any condemnation of them were made under the pretext of blockade. Jefferson had already said that some "may to a formal declaration of war prefer general letters of mark and reprisal because, on repeal of their edicts by the belligerents, a revocation of the letters of mark restores peace without the delay, difficulties and ceremonies of a treaty[1]." And if reprisals could be regarded as an informal and more convenient war, why should not they operate as such against all the world as well as against the state deemed to have given occasion for the use of force?

The experiment was first tried in 1827 by Great Britain, France and Russia, who declared a blockade of the coast which not long afterwards became that of the kingdom of Greece, in

[1] Letter to Lt.-Governor Lincoln, 13 November 1808: *Jefferson's Correspondence*, London, 1829, vol. 4, p. 119.

support of their intervention between the insurgent Greeks and the sultan of Turkey, the then sovereign of that coast. It must be observed that neither on this nor on any subsequent occasion has the blockade popularly called "pacific" been so styled officially. The executive orders of the government which applies it only mention blockade, and whether a state of war was intended to be entered on must be gathered from diplomatic or parliamentary statements and from the conduct of operations. If, for instance, a bombardment or any other act of force not within the limits of general reprisals should be added to the blockade, this would be a strong indication that war was understood to have been commenced, while a blockade to which the operations were restricted would easily be regarded as meant to be pacific.

The quasi-neutrals submitted to the blockade of 1827, as was to be expected considering the overwhelming strength at sea of the combination by which it was applied, and none of the vessels taken, whether Turkish or other, were confiscated, unless perhaps, for information on the point is lacking, Russian captures were condemned after war had ensued between Russia and Turkey, which it did not as between Great Britain or France and Turkey. The experiment so successfully tried was repeated, and again only with the sequestration either of quasi-belligerent or of quasi-neutral vessels, in 1831 by France against Portugal, in 1833 by Great Britain and France against the Netherlands, and in 1837 by Great Britain against New Grenada[1]. In 1838 France blockaded some Mexican ports and confiscated quasi-neutral vessels, but since she also seized a Mexican port it may be doubted whether the operation can be classed as a pacific blockade. Mexico in fact declared war, and Queen Victoria, as arbitrator between her and France, decided, 1 August 1844, that the Mexican vessels sequestered by France under the blockade became good prize by that declaration[2]. From 1838 to 1840

[1] In 1836 Russia notified a blockade of her own Circassian coast, which was in insurrection, and of course confiscated any vessels belonging to the insurgents that tried to break through, or would have done so if the case had occurred; but a British vessel, the *Vixen*, was only turned back, and our government did not press that of Russia for compensation for the loss of her voyage.

[2] Hogan, *Pacific Blockade*, p. 88.

France, and from 1845 to 1848 Great Britain and France jointly, blockaded the River Plate against the Argentine republic while professing to be at peace, interfering with quasi-neutral shipping but so far as England was concerned without confiscation. France however set up a prize commission at Montevideo which freely condemned quasi-neutrals. So far as these were Uruguayan they could not have complained, because the Uruguayan authorities had recognised the blockade by a convention concluded with the French commander on 23 April 1839, regulating during it the navigation of the Plate by ships under the Uruguayan flag, and the condemnations were for breaches of that convention. Others during the second blockade were British, and as belonging to a co-blockading power could not have complained. The Argentine authorities answered the blockade by issuing letters of marque, and the French jurists were in doubt whether there was not a war until the minister of foreign affairs stated in a letter that France was not at war with the Argentine republic, whereupon the *conseil d'état* reversed a decision of the commission at Montevideo which had condemned a cargo as contraband of war, while holding that the ship had been rightly released because she had been taken without a special notice of the blockade having previously been entered in her log[1]. The Hansetowns protested against the blockade, and Lord Palmerston desired a formal convention of peace in order, as he said, to legalise the operations retrospectively[2].

[1] This was the case of the *Comte de Thomar*, taken in the second blockade, sentence of 25 March 1848, 1 Pistoye and Duverdy 390. Among other cases before the *conseil d'état* see the *Caïman*, 16 January 1846, *ib.* 383; an Uruguayan ship captured for breach of the first blockade, then carried off by the Argentines and by them furnished with a letter of marque, and finally recaptured by the French. The *Eliza Cornish*, 17 July 1850, *ib.* 387, and the *Fame*, 12 June 1850, *ib.* 389, were British ships condemned for breach of the second blockade. The *Aurora*, 14 Nov. 1849, *ib.* 384, was another British-owned ship condemned under that blockade, but she carried no papers.

[2] See his letter of 7 December 1846, in Lord Dalling's *Life of Lord Palmerston*, iii. 327. Palmerston said that "unless you are at war with a state you have no right to prevent ships of other states from communicating with the ports of that state—nay, you cannot prevent your own merchant hips from doing so." On this it is to be observed that the question as to

It is needless to detail the numerous instances of pacific blockade which have since occurred, but in all of them except that applied to Greece by Great Britain in 1850 and the blockade of Greece by the powers collectively in 1886 quasi-neutrals were interfered with, while in none did the interference either with their shipping or with that of the quasi-enemy go beyond sequestration. But the remarkable occurrences of 1884 and 1902 require special notice. On 20 October 1884 the French admiral Courbet declared a blockade of a certain part of the island of Formosa, at that time a Chinese possession, neutrals to have three days in which to complete their loading and leave, and this was officially published in the *Moniteur* of the 23rd. Thereupon the British under-secretary of state for foreign affairs stated in the House of Commons, in answer to a question, that the notification of the blockade ought to be regarded by neutrals as a notification of a state of war; and in a note of 11 November to the French ambassador Lord Granville wrote that "the contention of the French government that a pacific blockade confers on the blockading power the right to capture and condemn the ships of third nations for a breach of such a blockade is in conflict with well established principles of international law": *Parl. Papers*, *France*, no. 1, 1885. It will be observed that mere sequestration is not mentioned. In the Chamber of Deputies, on 26 November, the French prime minister justified pacific blockade and the acts of hostility which may follow from it without a previous declaration of war, as belonging to the policy of material guarantees (*la politique des gages*), and mentioned three advantages which that policy had over a declaration of war: it left the door always open to negotiation, it allowed the rights resulting from previous treaties (*l'état conventionnel antérieur*) to continue, and it did not complicate the conflict by differences or difficulties with neutrals,

foreign ships is just whether pacific blockade affecting third powers is a recognised institution of international law, but that even should that question be answered in the negative it would remain for a British court of justice, in which a shipowner sued a naval officer for damages, to consider whether the king is not constitutionally entrusted with the power of controlling commerce in foreign parts, so far as it has not been placed under the protection of an act of parliament, especially as incidental to the line which he chooses to take in his relations with foreign states.

while a declaration of war would authorise taking measures against (*nous en prendre au*) neutral commerce, and in some sort make it a duty to take them. France however, being challenged by Great Britain either to accept a state of war or to drop the condemnation of quasi-neutral vessels, made on 3 January 1885 a new notification of the blockade of Formosa, based on "the state of reprisals existing between France and China." And shortly afterwards she took further action at the Chinese port of Foochow, whereupon, the state of war being unmistakable, Great Britain forbade the coaling of French ships of war in her ports.

The operations which Great Britain and Germany took jointly against Venezuela in 1902 were introduced on the British side by instructions for blockade given by the admiralty to Vice-admiral Douglas on 11 December. Vessels under any other than the Venezuelan flag were to be warned, and if afterwards attempting to communicate with any of the blockaded ports were to be handed over to the prize court at Trinidad; vessels sailing under the Venezuelan flag or in the service of the Venezuelan government were to be seized and treated as prize of war; persons not of Venezuelan nationality who wished to leave that country might pass the line of blockade on board ships having no cargo beyond the baggage of *bona fide* travellers. This might be ambiguous in the mouth of any other government, but, as coming from the British government after the position in which the latter had placed itself in 1884, it can only be interpreted as recognising that a state of war was being entered on; and in a proclamation of 22 December the governor and vice-admiral of Trinidad announced that war had broken out between his sovereign and Venezuela. The U.S.A. having declared that a pacific blockade would produce no effect as regards third powers, England declared that she was at war with Venezuela, and that the blockade had a warlike character from 20 December, the date of its establishment[1]. But the protocol of 13 February 1903, which closed the incident, was less outspoken though substantially to the same effect. Its recital ran that "certain differences have arisen between Great Britain and the United States of Venezuela," and Art. 7 was this: "The British and Venezuelan governments agree that, inasmuch as it may be

[1] Alvarez, *Droit International Américain*, p. 170.

contended that the establishment of a blockade of Venezuelan ports by the British naval forces has *ipso facto* created a state of war between Great Britain and Venezuela, and that any treaty existing between the two countries has been thereby abrogated, it shall be recorded in an exchange of notes between the undersigned that" a certain convention "shall be deemed to be renewed and confirmed, or provisionally renewed and confirmed, pending the conclusion of a new treaty of amity and commerce."

The operations of Germany against Venezuela on this occasion included the bombardment of more than one place on the coast, and it would therefore have been no less difficult than in the case of Great Britain to reconcile them with the absence of an intent of war. But by both powers the captured ships, public and private, neutral as well as Venezuelan, were restored.

The joint blockade of Crete by certain powers in 1897 was an anomalous case, for although it was aimed at hindering Greek action in Crete it was not Greece that was blockaded, and the blockade was not opposed by Turkey, the territorial power. No ship of any flag was allowed to land men, arms or stores for aiding the insurgents. Another anomalous case is that of a blockade the hostile character of which is inferred from its being undertaken in cooperation with an avowedly hostile power. When the Russian fleet was cooperating with the British in a blockade of Amsterdam, and Russia, being in declared hostility to France but not to Holland, claimed prizes "as taken from a common enemy," Sir W. Scott could not "discover the grounds on which the government to which the auxiliary fleet belonged could be considered as entirely neutral." *The Staadt Embden*, 1 C. Rob. 26, 30.

The Institute of International Law adopted this declaration in 1887.

The establishment of a blockade without war (*en dehors de l'état de guerre*) cannot be considered as permitted by international law except under the following conditions:

1. Ships under a foreign flag can enter freely notwithstanding the blockade;

2. The pacific blockade must be officially declared and notified, and maintained by a sufficient force;

3. The ships of the blockaded power which do not respect such a blockade may be sequestered. When the blockade has ceased they must be restored to their owners with their cargoes, but without indemnity on any ground[1].

The discussion had been introduced (1) by a report of Perels, the eminent *conseiller rapporteur* of the German admiralty, in which he maintained, as Heffter had done, the right of affecting neutrals by a pacific blockade, but limited it to preventing their passing the line of blockade, while the ships of the quasi-enemy may be sequestered, neither being subject to confiscation: (2) by a counter-report of Geffcken, to whom international law is indebted for the posthumous editions of Heffter's book, and who, avowing the change of his opinion, condemned pacific blockade altogether, even as against the quasi-enemy.

To sum the matter up, pacific blockade as against the quasi-enemy is too well established as a recognised institution to be longer attacked with serious hope of success. So long as war does not result, the only penalty by which it can be enforced is the sequestration of the quasi-enemy's ships, for the institution has been sufficiently differentiated from the reprisals out of which it arose for this affirmation to be made about it, whether or not a right of using the property seized as a real satisfaction is admitted in the case of reprisals or embargo, when redress has been long refused, even though war has not broken out[2]. As against quasi-neutrals the legal position of pacific blockade must be considered as still ambiguous, with the exception that even if interference with them and sequestration of their ships be regarded as lawful, and even also if war results, there can be no condemnation, because in favour of it there is only a minute shred of authority, while on the other side there is the solid argument that as against neutrals war cannot be carried back by relation to a time when it had neither been declared nor clearly

[1] 9 *Annuaire* 300.

[2] During the British blockade of Rio in 1862–3 it seems to have been contemplated that Brazilian ships taken should be sold for the purpose of realising the demand, but not that this was done. Hogan, *Pacific Blockade*, pp. 46, 117–120. No doubt pacific blockade and reprisals may be worked together, but then any confiscation for breach of the blockade will be reprisal.

existed. The argument which has prevailed in favour of pacific blockade as against the quasi-enemy, and which is urged in its favour up to the point of sequestration as against quasi-neutrals, is that it is a milder remedy than war; but it increases the power of the strong over the weak, and by confusing the bounds of the use of force in time of peace it impairs the certainty which is so important in international relations. The best case for it is when it is employed by the great powers collectively in their new and growing character of the legislature of Europe, but when they employed it against Greece in 1886 they interfered only with Greek ships. As the matter stands it would be difficult to characterise the pacific blockader who sequestrated quasi-neutral ships as a wrongdoer in an opprobrious sense, but it would be equally difficult to deny to the quasi-neutral the right of refusing to submit to the measure.

Moral Justification of Force without War.

In conclusion a word must be said as to the occasions on which it is held to be morally justifiable to resort to modes of force short of war. That question was discussed in the remonstrance made by Great Britain in 1751 against the stoppage by the king of Prussia of payment of the interest on the Silesian loan, which was an act differing only in its not being one of force from the reprisals we have dealt with. Reprisals were there allowed to be proper "only in cases of violent injuries directed or supported by the state, and justice absolutely denied by all the tribunals and afterwards by the prince." This limitation has been generally approved, only stress must not be laid in it on the term "violent." It is not doubted that merely civil wrongs for which justice is not obtainable either from the ordinary courts of law, by arbitration or by diplomacy may warrant reprisals, only the wrong must be clear. The point of the limitation is that reprisals are not a proper means of enforcing on a state the line of political conduct which it is desired that it should take, but pacific blockade is employed for that purpose also, as in the cases of 1827 and 1886 which have been mentioned. If however either pacific blockade or reprisals in their older and simpler form should be employed on an occasion which opinion, even general,

should pronounce insufficient, that, except where No. 2 of the Hague conventions of 1907 may be applicable, would not affect their legality any more than the legality of a war is affected by the want of justice in the ground for it. So far as any form of force in peace is recognised as an international institution, it is a weapon placed in the hands of states, to be used, so far as law is concerned, in their discretion.

The only attempt yet made to set up a legal barrier against the international employment of force in time of peace is to be found in No. 2 of the Hague conventions of 1907. By that convention "the contracting powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals," except "when the debtor state refuses an offer of arbitration or leaves it without reply, or while accepting the offer renders the settlement of the reference impossible, or after the arbitration fails to carry out the award"; and "it is further agreed that, except where otherwise arranged by the parties, the award shall determine the validity of the claim, the amount of the debt, and the time and mode of payment." But the importance of the convention is much diminished by the fact that many of the signatory states, including most of those against which force has been or is likely to be employed in order to obtain the payment of contract debts due to foreign individuals, have either not signed it or have done so with weakening or even destructive reservations. Among those reservations a very noticeable one is that made by Argentina, Guatemala and Salvador, that "public loans with issue of bonds, constituting the national debt, cannot in any case give occasion to military aggression or the physical occupation of the soil of American nations." Great Britain has signed the convention without reservation, but has not ratified it.

The Commencement of War as between the Belligerents.

It is natural that Grotius, whose definition of war we have found to be the best of those examined, should also be found to lay down a particularly clear doctrine on the mode of commencing it. He has spoken of war as an institution producing legal effects

(1. 3. 4. 1, 3. 3. 1. 1), and adds that by the law of nations a declaration of war (*denuntiatio*) is required in every case in order to produce those peculiar effects, but that it is sufficient if this proceeds from one party (3. 3. 6. 3, 3. 3. 7. 3). "The cause," he says, "for which nations have required a declaration for a lawful war was not, as some allege, that they might do nothing secretly or by a clever trick, for that consideration belongs rather to the perfection of gallantry than to law, as we read that some peoples even appointed the day and place of combat, but that it might appear with certainty that the war was not waged by private audacity but by the will of the peoples on either side or their heads; for that is the source of its peculiar effects, which have no place in a contest with brigands or in one between a king and his subjects" (3. 3. 11). It does not however follow that any particular form of declaration is necessary, as by a herald or by sending a bloody spear, or any condition added to the declaration, as the lapse of thirty days before commencing hostilities, for such have often fallen into disuse even among those who once required them (3. 3. 8). "Nor is it true that by the law of nations hostilities cannot be commenced immediately on the declaration of war, for that law requires no intervening time; but by the law of nature"—that is, as we now express it, by justice—"some time may be required by the character of the case, as if redress or the punishment of a guilty person has been demanded and has not been denied. For then so much time must be given as is necessary for doing conveniently what has been asked" (3. 3. 13).

Subsequent practice has ratified the opinion of Grotius as to the indifference of form in public declarations of war. Between 1657, when Sweden declared war against Denmark by a herald-at-arms sent to Copenhagen[1], employing perhaps for the last time the proceeding of the old *diffidatio*, and 1870, when France presented at Berlin a declaration of war against Prussia, it would be difficult to find an instance of war being expressly declared at the court against which it was directed, although notes declaring a rupture of negotiations may have been presented

[1] Twiss, *Law of Nations—War*, p. 62; quoting Martens, *Précis*, l. 8, § 267, and Holberg, *Danmarkskriges Hist.*, t. 3, p. 241.

which were so worded as to be substantially declarations of war. During the interval public declarations of war were made by documents bearing that name or that of manifestoes, issued at home by the declaring power, which through the world-wide notoriety ensured them in modern times served every purpose which could have been served by presentation at the other court. They also gave an opportunity of announcing the practice which the declaring power intended to follow in matters concerning neutrals, or even concerning the enemy, for example the treatment of his ships found in its ports. And these declarations of war are still in current use.

But on another point, the necessity that the commencement of hostilities should be preceded or accompanied by a declaration of war in some form or other, it was against a practice which had already begun before his time that the teaching of Grotius was directed. Of this practice the war between Elizabeth and Philip II was a conspicuous example. The depredations of Drake and the other English sea-captains took place without any declaration, but the queen's connivance at and participation in them were not intended as war, except in the limited and informal sense in which it used to be said in Elizabethan England that there was no peace beyond the line. Neither however was the despatch of the Armada accompanied by a declaration, which on Grotian principles would have been necessary even were it only an acceptance of a state of war declared by it to exist. And the practice continued in spite of Grotius, the first acts of force in the case of naval wars being sometimes done under a formal announcement of general reprisals, as was the case with the Anglo-Dutch war of 1665, which Sir Matthew Hale (1 *Pleas of the Crown* 163) states to have grown, without ever being "solemnly denounced," out of an English "act of council which instituted only a kind of universal reprisal." Thus an institution recognised as distinct from war, which in the middle ages may have served to bring about the settlement of many quarrels without the interruption of the relation of peace, was wrested to a mode of obscuring the demarcation between war and peace; and the Grand Pensionary De Witt was justified, from the point of view of a politician rather than of a jurist, in saying that "he saw no difference

between general reprisals and open war[1]." In 1739 George II granted letters of marque and reprisal against Spain on a ground falling within the narrowest view that can be entertained as to the proper occasions for such letters, that of failure to pay a sum of money due by treaty, and deprecated their being considered as an interruption of the peace. But the king of Spain ordered a counter embargo of all British ships in Spanish harbours, and war was thereupon declared by Great Britain, by the reflex operation of which war Sir Travers Twiss tells us that "the property seized by way of reprisal became subject to condemnation as the property of enemies *ab initio*[2]." The Seven Years' War was not declared as between Great Britain and France till 1756, and general reprisals had not previously been ordered, but French vessels had been captured by the British navy as early as 1754, and their restoration was refused by Lord Chatham in the negotiations for peace in 1761 on the ground that belligerent rights did not result from a formal declaration of war but from the hostilities first offered, which Great Britain laid to the charge of France in respect of the acts of force which had taken place in America and India. In 1778, when Great Britain and France were again fighting without formal declaration, it was represented to Lord Chancellor Thurlow that the case of

[1] Twiss says, it does not appear on what authority, that this remark was not made on the occasion of the reprisals mentioned in the text, but on that of an embargo laid by England on all Dutch vessels in her ports in 1662, for the remedy of a wrong alleged to have been done by the Dutch to the knights of Malta, and removed on its being pointed out that the practice of nations did not justify reprisals being made by a prince on behalf of any but his own subjects—a limitation with which Bynkershoek disagreed, since he regarded reprisals as a remedy to be granted to a complainant in the course of the administration of justice: *De Foro Legatorum*, c. 22. Twiss goes on to suggest that De Witt may only have meant that the embargo, "if not warranted by the law of nations, could only be regarded as an act of open war against the States General": *Law of Nations—War*, § 17. The remark however seems to have a broader meaning, and to refer to the political practice of the time.

[2] Twiss: *Law of Nations—War*, § 34. He says that the war, once declared, "reflected back upon the original breach of a treaty an undoubted character of hostility." But the reflex operation cannot be carried further than to the date of the letters of marque and reprisal, the breach of treaty not being an act of force.

1754–6 ought to be taken as one of reprisal, in which captures are only detained as pledges for satisfaction, and it was said that no prizes were then condemned or distributed before the declaration. Thereupon his lordship desired the secretary of the admiralty to order a search to be made as to the course taken in commencing wars by the British government since the revolution[1].

The war of 1778 was never expressly declared on either side. The French ambassador delivered in London a declaration of 15 March, to the effect that the king had recognised the independence of the United States and concluded a treaty of friendship and commerce with them, and was prepared to maintain effectively his treaty rights and the honour of his flag. The British government then recalled its ambassador from Paris and laid an embargo on all French vessels in British ports, whereupon the French ambassador was recalled from London, a French fleet sailed to North America, and a series of naval actions ensued. The war was therefore merely a *de facto* one throughout, unless the French document of 15 March can be considered as a conditional declaration of war, dependent on the attitude of Great Britain on its receipt, and converted by that attitude into an actual one.

The wars between the continental powers in the seventeenth and eighteenth centuries were often commenced in fact before their declaration, and were sometimes carried through without any declaration, quite as a matter of course, without that confused reference to reprisals as a distinct institution which helped to warp the thoughts and the conduct of the maritime powers. Thus on all sides the habit arose of regarding lawful war, that is war with all its legal effects, as commenced no less

[1] See Lord Thurlow's letter to the secretary of the admiralty, quoted from a MS. source by Twiss, *Law of Nations—War*, p. 67. Thurlow states, apparently not as his own opinion but as the representation made to him, that "declaration is said to be necessary to what writers call a solemn war, but it has been the practice of nations in all ages to begin hostilities otherwise." Grotius however did not make *bellum solenne* a distinct kind of war for which declaration was necessary. He preferred that term to *bellum justum* for all lawful international wars, as carrying no implication of justice, and his *bellum minus solenne* was a contention not international: 1. 3. 4. 1. and 2.

by fact than by declaration, and dating it from the commencement of hostilities. By that term, if we try to put a definite meaning on it, we must understand the first act of force done with the intent of war and not with that of reprisals or pacific blockade, or the first act of force done with the intent of reprisals or pacific blockade if a war follows, or the first act of force done with whatever intent—self-defence, seizing what is called a material guarantee, or any other—which the state affected by it chooses to regard as one of war. Nor is it possible to refuse its legal effects to a state of war so entered on, or to date its commencement as between the parties otherwise. But from the point of view of political morality it cannot be too strongly maintained that so serious a step as the entrance on a state of war ought not to be taken without the deliberation for which the only security approaching to adequacy is the necessity of expression. No power doing an act of force with the intent of war, nor any power treating as war an act of force done by another, is morally justified in omitting to accompany its conduct by some kind of declaration. Nor again is any power doing an act of force morally justified in not having a clear view whether it intends it as war or not. If an act of force affects third powers and they submit to it, deeming at the same time that it places them in the position of neutrals in war with neutral rights and duties, they can scarcely avoid stating the view which they take of the situation. All this springs from or coincides with the principle that international relations ought to be certain, on which we have seen Grotius basing his demand for a declaration of war in every case; and since the long peace of 1815–1848 the mere *de facto* commencement of hostilities has fallen into desuetude, except so far as pacific blockade tends to obscure the matter as reprisals formerly did, and the commencement of hostilities has been preceded or accompanied by declarations of war.

The demand for an interval of notice, more or less defined, which is sometimes put forward, more by popular or partisan writers than by serious students, we must reject, again in agreement with Grotius. An attack which nothing had foreshadowed would be infamous, and third powers would probably join in resenting and opposing it. But usually claims

or complaints are pressed with increasing insistency, the tone of the negotiations becomes more and more acrimonious, preparations are made which cannot altogether be concealed, and the outbreak of war is not really a surprise to anyone. Sometimes the disputant who declares it has delayed doing so until the preparations made by his adversary have convinced him that he can no longer safely delay, and it would be impossible to demand from him a notice which would only give a further advantage to the party which had tried his forbearance so long. In 1187 the emperor Frederick Barbarossa, by a constitution made in a diet at Nuremberg, imposed on the right of anyone to do justice to himself the condition of giving three days' notice to his adversary. This was suitable enough to private war, but not to the contests of the German princes when the weakness of the empire had caused their position to approach that of independence. Accordingly in 1356 the Golden Bull of the emperor Charles IV retained the suspensive interval only as an alternative to declaration, providing that no one should on any pretext invade his neighbour unless he had given him three days' personal notice beforehand, or had publicly signified his intention to make war against him at the place of his usual residence in the presence of competent witnesses. Nor has a necessity for an interval between announcing the intention of hostilities and commencing them ever formed part of the systematic relations between the nations of the world[1].

It will have been noticed that the necessary declaration of war has been spoken of as preceding or accompanying the first act of force, and that the denial by Grotius of the necessity of even the shortest interval between them amounts to permitting the one to accompany and not necessarily to precede the other.

[1] Here may be mentioned a clause quoted by Calvo, t. 2, § 1665, from a treaty of 1816 between Portugal and England, and treaties of Brazil with France, 1826, England and Prussia, 1827, and Denmark, 1828: "if a misunderstanding, a cessation of friendship or a rupture should arise between the two crowns (from which may God preserve us) the rupture shall not be deemed to exist until the recall or departure of their respective diplomatic agents." This, strictly construed, provides against an earlier commencement of the legal effects of a state of war, but was probably dictated also by a desire to preclude acts of force without notice.

That it is necessary not to make everything turn on the declaration's preceding is shown by the case in which a power that has not left its positive insistence on its claims in doubt, and which therefore must be expected to meet force by force, finds itself confronted by preparations which it is no longer safe to disregard. It would be idle to say that a power so circumstanced must let slip an opportunity of hindering the offensive preparations for want of a previous declaration of war, nor can its hindering them be really a surprise, but it will be bound to regularise its action by declaring war as soon as practicable. And this may not be for some days if the incident took place at a distance from the seat of government, so that the term "accompanying" which has been used must not be construed with pedantic strictness. The maxim that the state and legal effects of war must be dated from the commencement of hostilities will apply, but the case will be very different from those which gave birth to that maxim, such as captures being made in distant oceans by commanders acting under instructions to that effect, and war being declared two years afterwards. An example is furnished by the commencement of the war of 1894 between China and Japan. The dispute between those powers concerned their respective relations to Korea, and from early in June both parties had been pouring troops into that country. On 25 July a Japanese squadron met near Korea with Chinese men-of-war escorting the *Kow-shing*, a transport loaded with a further number of soldiers; and an action commenced, before indeed the Japanese had sighted the *Kow-shing*, but when it must have been obvious to both parties that each was on the spot in order to assist in strengthening its own position in Korea and prevent that of the other from being strengthened. Whichever side fired the first shot, the government under whose instructions it was fired must be considered to have borne with the preparations of its adversary up to the point at which it did not deem it safe to bear with them any longer, and cannot be blamed for trying to stop them. The emperor of Japan formally declared war on 1 August, and on 10 September Count Ito, his minister president of state, wrote officially "let it be known that the commencement of the present war was 25 July."

The war of 1904 between Japan and Russia began in a more regular manner, for the note which Mr Kurino, the Japanese minister, presented at St Petersburg on 6 February expressly declared the termination of the negotiations and the right reserved by his government to take independent action, while he at the same time announced his intention to take his departure with the staff of his legation. This can hardly be regarded otherwise than as a declaration of war, especially since on 28 January Mr Kurino had said to Count Lamsdorff that "further prolongation of the present condition is not only undesirable but rather dangerous," and on 31 January Count Lamsdorff told Mr Kurino that "he fully appreciated the gravity of the present situation." Indeed the Japanese note bore a close resemblance to that which the Spanish government communicated to General Woodford, the United States minister at Madrid, on 21 April 1898. This declared that relations between the two governments were broken off and that no further American communication would be received, and was answered by the General's demanding his passports the same day, while the Spanish minister at Washington had demanded his the day before. Captures of Spanish vessels were made by the United States navy at least as early as the 22nd, and on the 25th Congress, consulted by President McKinley, determined by a joint resolution that there had been war from the 21st inclusive. That was a legitimate interpretation of the situation created by the Spanish note, and not a retrospective dating of the war to the first acts of force or in order to cover them, as has been represented. If we cannot be content to agree with Grotius that declarations of war are not tied to form, it will be difficult to know where to stop, short of requiring a special messenger to be sent with them.

It remains to say that a declaration of war may be conditional, presenting an ultimatum to be accepted within a given time, otherwise war then to begin. This is very common, and an instance familiar to our British readers is that of the ultimatum delivered on behalf of President Kruger to the British agent at Pretoria on 9 October 1899, by which it was declared that the absence of an affirmative answer to the four terms therein laid down, by 5 p.m. on the 11th, would be

regarded as a formal declaration of war. It has never been controverted that a state of war is entered on at the expiry of the delay mentioned for that purpose in a conditional declaration without satisfaction of its demands.

To the foregoing statement of the history and unwritten law of the subject it must be added that by Art. 1 of No. 3 of the Hague conventions of 1907, the one relative to the Opening of Hostilities, which was signed by all the powers represented at that conference, "the contracting powers recognise that hostilities between them must not begin without a previous and unequivocal warning, in the form either of a declaration of war giving reasons, or of an ultimatum with a conditional declaration of war." It is thus provided, first, that any recurrence of the old *de facto* wars will in future be a breach of formal international law, though the legal effects of war will not the less follow. Occasions may still arise on which it will be necessary to defeat by force preparations which it is no longer safe to disregard, at some point where a previous warning cannot be given, and it may be assumed that general opinion will then be content with a declaration made as early as practicable. Secondly, the declaration must be in writing, since it must contain an expression of reasons, and it must be directly addressed to the government to be affected, since the old form of a manifesto might conceivably fail to give a previous warning, and could not in any case convey an ultimatum with a conditional declaration. But, thirdly, the interval by which the warning must precede hostilities is wholly undefined, and Italy in 1911 availed herself of the latitude thus left by allowing in her ultimatum to Turkey no substantial interval for compliance with it, and by commencing hostilities with no substantial delay after the presentation of her declaration. The commencement of war as between the belligerents remains, therefore, on its Grotian footing, only with less indifference to form.

Armed Interventions.

What has been said about the commencement of war will not in general apply to those armed contests which arise out of the intervention of a state in the internal dissensions of another

state. Such interventions are usually undertaken by stronger powers in the affairs of weaker ones, or by a coalition in the affairs of a single power, and are therefore usually successful for the time although the resentment they cause may aid in producing a reaction later. Consequently, if the party intervened against is not in possession of the government, it will probably be put down without a state of war having existed between the two powers, although the laws of war ought to be and probably will have been observed in the fighting. There will have been no declaration of war, nor any occasion for one. If on the other hand the party intervened against is in possession of the government, as Napoleon was in possession of that of France in 1815 and the constitutionalists of that of Spain in 1823, there will still be no declaration of war, because the interveners, not recognising the actual government as legitimate, will not admit that their quarrel with it is a quarrel with the state which it claims to represent. Here also, therefore, there will not be a state of war with the usual abrogation or suspension of treaties as its effect, and yet the struggle may be such that at its close some new arrangements between the *de facto* belligerents may be desirable. Thus in 1815 the allies did not declare war, and they allowed the representatives of Louis XVIII to sign on behalf of France their manifesto of 13 March against Napoleon and on 9 June the final act of the Congress of Vienna, while *de facto* hostilities were onward between them and the actual government of that country[1]. The struggle was closed by the treaty of 20 November 1815, which was not nominally one of peace, but in Art. 10 of which "the hostilities" are mentioned; and that treaty was described as one of peace in the protocol and declaration of Aix-la-Chapelle, 15 November 1818. Similarly the French invasion of Spain in 1823 produced no technical state of war, and was followed by a convention, 5 January 1824, about the maritime prizes taken.

[1] The only prize case appearing in the English reports as arising out of the short war of Waterloo is that of the French frigate *l'Étoile*, which with her consort commenced the action in which she was taken: 2 Dodson 106.

The Commencement of War as against Neutrals.

The existence of a state of war as between the belligerents imposes the duties of neutrality on third powers and their subjects, and gives them what are called the rights of neutrality, but which are in truth only the limitations of its duties, for no new right accrues to a neutral as such. But although the duties arise from the facts it would be unjust to impose them without notification of the facts or something equivalent to it. If there has been a declaration of war, whether expressly to the enemy or by a manifesto, it is in practice communicated to third powers, although the publicity of a manifesto might make it as suitable for the purpose of notice against neutrals as against the enemy. If the declaration of war has been conditional, the fact that the time fixed by it has expired without the ultimatum being complied with will not be of so public a nature as to amount to notice to third powers, and it must be communicated to them. And in any case the communication to a third power will bind its subjects, it being the duty of every government to give the publicity necessary for the protection of its subjects to all international events of which it is apprised. If as between the belligerents the state of war is dated from the first act of force which either side chooses to regard as war, that antedating can have no effect as against third powers or their subjects. But it will not follow that if there has been no declaration of war, or if there has been a failure in the duty of communicating such a declaration, third powers and their subjects can escape the duties of neutrality during the whole of the contest. If they know the existence of the war, or if it is so notorious that they must be held to have known it, they will be bound by those duties. This is taught by all writers, and was applied by the Italian prize court, 8 December 1896, to justify the capture of the Dutch ship *Doelwyk*, carrying contraband during a *de facto* war between Italy and Abyssinia which had not been declared[1]. In the case of a civil war, which commences without declaration, and indeed is not a contest involving a state of war between two powers, duties identical with those of neutrality

[1] See an article on the case, by Brusa, in 4 *Revue Générale* 157–175.

arise for all powers which are not parties to the contest, and are recognised by them as incumbent on them and their subjects by the fact of their recognising the belligerency of the parties. If either party uses modes of warlike force which affect third parties, as the blockade of ports not within its *de facto* authority and therefore not capable of being closed by a domestic measure, the powers which allow such modes of force to be applied against them or their subjects thereby recognise the war and their duties as neutrals in consequence of it[1].

The Hague convention of 1907 relative to the Opening of Hostilities is in accordance with the foregoing paragraph. "The state of war," it says, "must be notified to the neutral powers without delay, and will not take effect with regard to them until after their receipt of a notification, which may even be made by telegraph. Nevertheless, neutral powers cannot plead the absence of notification if it be established beyond doubt that they were in fact aware of the state of war."

[1] See *Part I—Peace*, pp. 52–4.

CHAPTER II.

LEGAL RELATIONS AS AFFECTED BY WAR.

War as a Relation between States: its Effect on Treaties.

The outbreak of war removes the controversy out of which it arose from the domain of law. It will be settled at the peace on such terms as the superiority of force decides; and if it turned on the disputed interpretation of a treaty, and such interpretation is not declared at the peace for the future, the treaty will be regarded as annulled. There cannot be a contract unless the minds of the parties are agreed, and the war will have shown that their minds are not agreed in the treaty in question.

Further, war interposes a practical obstacle to dealing on the footing of law even with obligations which have not been in dispute, and it may result in such a change of the relative strength of the parties and in the surrounding circumstances that the parties, or at least the stronger of them, will not desire that those obligations should continue. It is therefore the general rule that war abrogates the treaties existing between the belligerents, and that their revival, if desired, must be expressly provided for in the treaty of peace.

To this rule however there are certain exceptions. First, all conventional obligations as to what is to be done in a state of war must continue in force, or they would have no operation at all. Such is the Anglo-French convention providing for a continuance of the postal service between the two countries in the case of a war between them, and such are the St Petersburg declaration against the use of explosive bullets, and all other

conventions relating to the laws of war. Another instance is the provision in very numerous treaties for the treatment which the subjects of the respective parties and their property are to receive in case of war between them.

Secondly, transitory or dispositive treaties[1], including all those which are intended to establish a permanent condition of things, form another exception. Not only treaties of cession, boundary, recognition of independence or of a dynasty, and such like fall under this head, but also those stipulations which confer rights intended for use in daily life and having no conceivable connection with the causes of war or peace. An example is the clause in the treaty of 1795 between Great Britain and the United States giving to their respective subjects and citizens the right to hold and transmit land then held by them in the other country, notwithstanding their or their heirs and assigns being aliens[2]. The treaty of 1760 between France and Sardinia, now applying to Italy, relative to the execution in either country of judgments rendered by the courts of law of the other country, and the conventions of 12 June 1902 and 17 July 1905 between numerous states, unhappily not including the *penitus toto divisos orbe Britannos*, on important parts of private international law, furnish other examples. All these are delimitations of rights as real and implying permanence as plainly as delimitations of boundaries. During a war the rights may be dormant for want of the opportunity to enforce them, just as boundaries may be transgressed by arms; but the peace, when concluded, is a peace with and on behalf of each belligerent state with all its known equipment of territory and permanent rights, and needs no expression to that effect[3].

[1] See these explained in the volume on *Peace*, 2nd edn., pp. 60–62.

[2] That this clause was not abrogated by the war of 1812, notwithstanding that it was not expressly revived at the peace in 1815, was recognised in the United States by the case of the *Society for the Propagation of the Gospel v. Town of Newhaven*, 8 Wheaton 464, Scott 428, and in England by that of *Sutton v. Sutton*, 1 Russell and Mylne 663.

[3] By the treaty of 1783 Great Britain agreed that the inhabitants of the United States should have liberty to fish in the waters of Newfoundland and all other parts of H. B. M.'s dominions in America. The peace of 1815 after the war of 1812 was silent as to this, and the United States thereupon contended and Great Britain denied that the liberty continued.

A third exception is that of treaties establishing arrangements to which third powers are parties, such as guarantees and postal and other unions. These cannot be abrogated by the war, because it cannot affect the rights of third parties. There may during the war be practical difficulties in the way of carrying out their provisions, but at least a belligerent ought not actively to violate them unless they are of a non-political nature and his necessity is great. Guarantees are political, and the plea that he is at war with another party to them will not avail a power which actively violates them to the detriment of the state guaranteed. But although treaties making political arrangements are not destroyed by the mere fact of a war in which all the parties to them are not engaged, it may happen that one of the belligerents is so weakened by the war or by the terms of peace that he can no longer fulfil a guarantee or some other political stipulation to which he has agreed, or that to do so would be a greater burden than in his reduced condition he can be expected to bear. Then he will be freed, not by any rule of law but by the force of circumstances of which those with whom he has contracted must take account.

Outside the exceptions which have been discussed, treaties between belligerents do not survive the outbreak of the war. At the peace there is no presumption that the parties will take the same view as before the war of their interests, political,

The former did not deny the general rule that treaties are abrogated by war, and the latter did not deny that engagements "in the nature of perpetual obligation" are an exception to that rule. But the former argued that the liberty in question was an integral part of the partition made in 1783 between the two powers, and the latter that it was of such a nature that it could only rest on "conventional stipulation." See Wheaton's *Elements*, part 2, c. 4, § 8, and part 3, c. 2, § 9, with Lawrence's notes, and Hall, § 27. By a convention in 1818 the United States expressly renounced all claim to the liberty except so far as given by that convention, and the incident may suggest an exception to the exception now under consideration, namely that the stipulation of a servitude to be enjoyed in the territory or territorial waters of the other belligerent is not one that can revive after a peace which does not mention it. Wheaton does not admit this character of stipulations of servitude, being evidently under the influence of his country's view in the diplomatic discussion here referred to. See the volume on *Peace*, 2nd edn., pp. 369, 370, and the Fisheries award of 1910.

commercial or other. It is for them to define on what terms they intend to close their interlude of savage life and to reenter the domain of law. Those terms are at their disposal or at that of the stronger, and if the price exacted for peace is heavy, it ought not to be spoken of as a fine or penalty. Indignation at what was regarded as an unjust pretension, or resentment at what is regarded as a too obstinate resistance, may have contributed to fix it, but law has had no concern in fixing it. It is the last act of the lawless period, and both opinion and practice allow the victor to take advantage of that period by insisting on terms having no relation to the cause or occasion of the war. The terms may be just, more often the consciousness of their injustice is obscured in the victor's mind by his excited feelings, but in any case the genius of law does not inhabit a temple shared by the god of battles, and only returns when he has withdrawn from it[1].

General View of the Relation of Individuals to War.

We have now to consider the relations of each belligerent state to individual subjects of the other, and of the subjects of the respective belligerent states to one another. A good method will be to place in contrast the ideas and practice current about the matter at the close of the middle ages and now, and then to speak of the gradual passage from the one to the other.

[1] On the subject of this section there is a difference of statement, probably more than of opinion, since those who prefer to say that treaties are not abrogated but suspended by war between the parties seem to build mainly on what those who make abrogation the rule have to treat as exceptions. Also the exception of transitory or dispositive treaties admits, as we have seen, of differences of opinion whether particular cases fall within it. Those who have to draw up treaties of peace ought never to omit the distinct expression of what is intended as to the old stipulations between the parties, and they seldom make such an omission. They will perhaps be less likely to make it if they are under the impression that it would lead to the loss of possibly valuable treaties. Hall's § 125, pp. 399–405 of the 4th edition, is worth reading, but, as might be expected from the nature of the subject, hardly leads to more definite conclusions than those here given. A similar remark may be made on the rules voted by the Institute of International Law at Christiania in 1912 on the effects of War on International Conventions.

At the close of the middle ages the whole matter was governed with unflinching consistency, at least in theory, by the principle of the solidarity between a prince and his subjects and between a city and its citizens. The *diffidatio* which introduced the state of war and made prince or city the enemy of prince or city had for its necessary consequence that each prince or city was the enemy of the subjects or citizens of the other, and that the subjects or citizens of each were individually the enemies of those of the other. Peaceful relations were not modified but destroyed, and legal relations during the war there were none, in whatever degree Christianity or chivalry might mitigate practice. Hence the proclamation which accompanied a *diffidatio* did not merely require the subjects to whom it was addressed to capture the property of the other prince and the persons and property of his subjects, as in the case of general reprisals. It went on to require them to break off all commerce, that is all peaceful dealing with the enemies, and to attack them indiscriminately—*courir sus aux ennemis*—a famous formula which meant to kill them, take them captive and pillage them. If any authority were wanted for what lies on the surface of the history of those times, it may be found in the statement of Grotius that "a war declared against him who has the supreme authority in a population is considered to be declared against all his subjects and those who may join themselves to him as allies" (3. 3. 9).

In contrast with what has been described, modern ideas and practice do not present the same simplicity and consistency. They cannot be stated without distinguishing between what may be called the military and the civil aspects of war, the former comprising what is observed or deemed proper in the application of force by sea or land, the latter what is observed or deemed to be legal in courts of justice.

It is recognised on the military side of war that the true principle is that laid down by Montesquieu, namely that "nations ought to do one another in peace the most good, and in war the least evil, that is possible without injuring their true interests." In accordance with that principle, no exercise of force is now placed for its legal justification on the ground that the individual against whom it is directed or who suffers by it

is an enemy. It is not deemed lawful to affect an individual except so far as doing so may be a necessary or at least an important means of breaking down the resistance of the enemy state. To that extent he may be considered as identified with his state for the purpose of the war. The case which presents the strongest appearance to the contrary is that of the capture and condemnation of the property of the enemy's subjects at sea where no directly military reason, such as breach of a blockade or carrying contraband of war, is involved; but even that practice is not now upheld by any one except on the ground of the contribution which it may make to depriving the enemy state of the means of carrying on the war. That this is the accepted view of the relation of individuals to war in its military aspect may be shown by the following quotation from Lueder, who of all modern authorities was one of the least disposed to limit military exigencies.

"The commencement," he says, "of war and the entry of the law of war on the scene introduce for the subjects of the belligerent states the condition of war (*kriegsstand*), that is the special relation which in consequence of the outbreak of war arises between them and the opposite party. All the subjects of the states which are at war are under that condition, though not in the same degree, notwithstanding that the rule holds that peaceable private persons belonging to the belligerent states are not mutually enemies. For even those who take no part in the operations of war have to bear, in the measure of what has been above established in general and in the following pages will be carried out in detail, certain burdens, restrictions, sacrifices, disadvantages, in one word duties towards the enemy state, which war naturally brings with it." Holtzendorff's *Handbuch des Völkerrechts*, vol. 4, § 90, p. 371.

On the civil side of war opinion has not moved so far from the mediæval point of view. Of the questions which arise in this department there may be at once dismissed as obsolete that of making prisoners of innocuous persons happening to be in the territory of the enemy state. The others may be arranged in two classes, labelled for convenience as those of Confiscation and Non-Intercourse. The first class concerns the right of a state to confiscate for its own profit all property and rights of the subjects of its enemy state which it finds within its territory or within its power. In the ancient law of war this right was unquestioned and very frequently exercised, founded as it was

on the solidarity of individuals with their prince, by virtue of which they were themselves enemies of his enemy. It cannot be and has not been alleged that any necessity, direct or indirect, brings it within the principle which identifies subjects with their state for the purpose of war, and the confiscation of the property or rights of individuals on land in the enemy's territory is now entirely obsolete. Only ships and cargoes which enter the harbours of an enemy state after the commencement of war are considered to be in the same legal situation as if they were still on the high seas, and are liable to seizure and condemnation in the absence of immunities expressly granted.

The questions which have been classed as those of non-intercourse concern the legal relations of individuals belonging respectively to the different belligerent states. Can they contract with one another during the war? And does the outbreak of war rescind contracts then subsisting between them, or merely suspend the remedy on such contracts, or has it no effect at all on them? Here we have to do with the enemy relation in which, as the extreme outcome of the principle of solidarity, mediæval dogma placed the subjects of warring princes towards one another; and it might be expected that here we should find, *a fortiori*, whatever mitigation modern ideas have introduced into the relation between individuals and the enemy state. But it is here that the ancient dogmas most stubbornly maintain their ground, a circumstance for which three causes may be assigned. First, while the propriety of any given military action is discussed before the bar of public opinion, and the wisdom of exercising a right of confiscation is judged by the sovereign who is to profit by it, the rules of non-intercourse have to be judged by courts, which proceed on grounds not of propriety or of wisdom but of law, and incline towards precedent and not towards innovation. Secondly, since there are dealings between individuals on the opposite sides which it would not be reasonable to allow in war, it might well be thought better to let the matter stand on the footing of a prohibition of intercourse tempered by licenses than to introduce a general freedom of intercourse subject to exceptions sometimes disputable. Thirdly, since there is no bar but that of public opinion before which the propriety of military procedure can be brought, it is

difficult to maintain a distinction with regard to it between opinion and law. There is little meaning in saying of a particular measure of war that it is condemned by the general conscience of mankind, but that it is not yet contrary to international law. If it is so widely condemned it will not be commonly practised, while, if it is occasionally practised in spite of the general condemnation, the many writers who magnify military necessity will refer the permission which they accord to it rather to occasional necessity than to law. But the distinction between opinion and law is always present to courts of justice, and tends to hold them back from admitting a change in the law.

After the foregoing general contrast between the ancient and the modern, the latter of which will have in the sequel to be drawn out in detail, we must say what can be said in general terms as to the manner in which the passage from the one to the other was made. There was the progressive influence of Christianity and humanity, and a great effect was produced by Grotius who, while adopting as the strict theory of war what he found in the *jus naturale* and the current *jus gentium*, insisted on the duty of tempering it in practice by the charity which the divine law enjoined. In aid of that charity came the habit, and indeed the necessity, of regularising war which the institution of great standing armies and fleets brought with it. In Vattel the new practice begins to undermine the theory. He writes in 1758 that although the old formula of *courir sus* was still a part of declarations of war, usage had come to interpret it as obliging indeed all subjects to seize the persons and property of enemies when falling into their hands, but not as inviting them to undertake any offensive expedition without commission or particular order (l. 3, § 227). The declaration of war of 2 January 1762 by Great Britain against Spain is based on the view so expressed. It omits the formula of *courir sus*, and calls on the various commanders and officers therein enumerated, "and all other officers and soldiers under them by sea and land, to do and execute all acts of hostility in the prosecution of this war against the king of Spain, his vassals and subjects, willing and requiring all our subjects to take notice of the same, whom we henceforth strictly forbid to hold any correspondence or communication

with the said king of Spain or his subjects": Twiss—*War*, § 45. Thus non-intercourse was maintained for the civil aspect of war while an advance was made in regularising war on its military side.

Not long afterwards Rousseau essayed to put the ideas which were gaining ground into a philosophical form. "War," he wrote (*Contrat Social*, liv. 1, ch. 4), "is not a relation of man to man but of state to state, in which individuals are enemies only accidentally, not as men nor even as citizens but as soldiers, not as members of their country but as its defenders. In fact a state can only have other states for enemies and not men, seeing that no true relation can be established between things of different natures." This doctrine Rousseau, with his usual levity, declared to be "conformable to the maxims established in all times and to the constant practice of civilised peoples." I have criticised it as follows. "If no true relation can be established between states and men, it must be impossible for men not only to be the enemies but also to be the citizens or members of a state, which in the same passage they are described as being. And if it is only as soldiers that men are enemies even accidentally, every measure employed in war with reference to the civil population, including the most moderate requisitions, contributions and interferences with their liberty, must be unlawful[1]." But in a revolutionary age the very extravagance of Rousseau's language helped to set it up as a standard for those who desired to limit the overthrow by war of all peaceful relations. It was employed with little or no variation by Portalis, in his discourse on the opening of the French prize court in 1801, and is often quoted with rather unreflecting approval, mainly for the sake of its denial of war as a relation of individual to individual, which element of it may be pronounced philosophically sound notwithstanding the hesitation of courts of law. The other element, that war is a relation of state to state in which individuals are involved only as taking an active part in the defence of their country, does not practically delude any one into denying the identification even of civilians with their state so far as necessary for the purposes of war. Nor is such identification unreasonable, for the acts which lead

[1] *Chapters on the Principles of International Law*, p. 259.

to war are and must be those of individuals. The state is an abstraction, a mere legal entity, incapable of acting otherwise than by officials representing all its members. And those members are not entitled by any principle of natural law or of justice to form an association in which their liability for the mischief they may do by their representatives is limited. Often indeed the action of the ministers who nominally direct the powers of the state is forced on them by the pressure of the opinion of the mass of their fellow subjects.

The conclusion of the matter is that the relation of enemies ought to be held to exist (1) between two states at war with one another; (2) between each of those states and those subjects of the other whom for the purpose of the war it may be necessary to affect by acts of force, and so far only as it is necessary so to affect them; but not (3) between individuals. In the further discussion of the subject the terms "enemy subjects" and "enemy property" will be employed for shortness, and in accordance with their common use, in the sense of "subjects of the enemy state" and "the property of the enemy state or of its subjects," without intending to attribute an enemy character to individuals except within the limits thus laid down as theoretically proper.

Enemy Subjects, and their Property and Rights, within the Territory of a State.

Coming now to the details concerning the legal relations between belligerent states and subjects, so far as concerns their civil as contrasted with their military aspect[1], we first have to deal with enemy subjects and property happening to be within the territory of a state at the outbreak of war, or to come within it during the war, incorporeal rights to be sued for in the jurisdiction or falling under the sovereign power of the territory being included as property within it. One class of property, in this case an incorporeal right, shall be mentioned at the outset, since it no longer gives rise to any question. Neither the principal nor the interest of a state debt can be

[1] See above, p. 36.

confiscated or sequestrated because the individuals to whom it is due are enemy subjects. A state contracting a loan is understood "to contract that it will hold itself indebted to the lender and will pay interest on the sum borrowed under all circumstances": Hall, § 144. No attempt to the contrary of this implied undertaking has been made, either in the case of war or in that of reprisals, since Frederick the Great withheld the payment to British subjects of the interest on the Silesian loan, by way of reprisal for the capture of Prussian vessels under rules of maritime law which he disputed. The affair was compromised, but that did not prevent an adverse opinion on Frederick's conduct from being so generally declared, both at the time and since, that it is universally taken to have settled the question. The reason commonly given is that the debts of a state are debts of honour, to which it may be added, as cause rather than as reason, that if the rule were otherwise states would have to contract their loans at much more onerous rates of interest.

Another class of property, namely enemy ships in the harbours of the territory, may also be singled out for immediate consideration, not as being equally free from question, but because its nature connects it with the military aspect of war, as affecting property at sea, rather than with the civil view as to enemy property within the territory. All ships and cargoes in the harbours of the territory at the outbreak of war, belonging either to the enemy state or to enemy subjects, were seized under the old law for the profit of the state, in England by the name "droits of admiralty"; and this claim was enforced by the British government as late as the outbreak of war with Denmark in 1807. Indeed it was not unusual to lay an embargo on ships belonging to subjects of a power with which war was imminent, in order to detain them within reach of seizure. But since the middle of the nineteenth century it has been the constant practice in declarations of war to name a time within which enemy merchant ships then in harbour may load and depart; and it is usual to add that enemy merchant ships which have sailed from a foreign port before the date of the declaration may enter and discharge their cargoes, and then depart with freedom from molestation on their voyage to any

port not blockaded[1]. This, combined with the growing tendency of opinion to favour private enemy property even at sea, may be considered to have made it certain that merchant ships and cargoes in harbour at the outbreak of war and not belonging to the enemy state, with the exception of ships of which the construction indicates that they are intended to be converted into ships of war, would not again be confiscated. But now the subject is dealt with by the *Hague Convention* (no. 6 of 1907) *relating to Enemy Merchant Ships at the Commencement of Hostilities*, by Art. 1 of which it is laid down that "when a merchant ship of one of the belligerent powers is in an enemy port at the commencement of hostilities" [first paragraph], or "has left her last port of departure before the commencement of the war and enters an enemy port in ignorance of the hostilities" [second paragraph], "it is desirable that she should be allowed to depart freely, immediately or after a sufficient term of grace, and to proceed direct, after being furnished with a passport, to her port of destination or such other port as shall be named for her." Then Art. 2 lays down that "the merchant ship which by reason of *force majeure* has been unable to leave the enemy port during the term of grace contemplated in the preceding article, or which may not have been allowed to leave it"—a clause which allows little to be regarded under Art. 1 as merely desirable—"may not be confiscated. The belligerent may only seize her under an obligation to restore her after the war without indemnity, or requisition her with indemnity." The capturing belligerent is restricted to a similar option, with the added alternative of destruction subject to indemnity, in the case of a merchant ship which left her last port of departure or call, whether of her own or of a neutral country, before the commencement of the war, and which is met at sea while ignorant of the hostilities (Art. 3), and in the case of enemy property on

[1] In 1854 Great Britain and France granted six weeks for Russian ships in their harbours to load and depart, and allowed Russian ships that had sailed from a foreign port before the declaration of war to enter their harbours and discharge, departing forthwith and proceeding to a non-blockaded port.

In 1904 Japan gave Russian ships seven days in which to load and depart, and Russia gave Japanese ships two days from the local publication of the decree.

board any ship falling under Art. 1, 2, or 3 (Art. 4). By Art. 5, merchant ships of which the construction indicates that they are intended to be converted into ships of war are outside the whole convention. The United States have not signed the convention, and Germany and Russia have signed only under reserve of Arts. 3 and 4.

The immunity from confiscation will not prevent an embargo being laid for special military reasons, as in 1870 Prussia detained neutral as well as French ships for a time at Kiel, in order to conceal her operations for blocking the harbour. Ships belonging to the enemy state in the harbours of the territory at the outbreak of war, and all enemy ships, public or private, entering the harbours of the territory during the war without express immunity, remain subject to seizure and appropriation. A few instances, now more than a century old, in which enemy ships, even of war, were allowed to leave ports which they had entered in distress may be seen in Hall, § 145, but must, as he rightly considers, be referred to humanity and not to law.

On all other points relating to enemy subjects and property within the territory the first relaxation of the ancient law, which made prisoners of the subjects and confiscated the property, seems to have taken place in favour of merchants. By s. 41 of Magna Carta (1215) King John provided that "if in time of war merchants of the country at war with us shall be found in our country at the outbreak of the war, they shall be attached without damage to their bodies or their goods, until it is known to us or to our chief justice how merchants of our country who are then found in the country at war with us are treated; and if ours are safe there the others shall be safe in our country." When Louis IX arrested the English merchants and their goods in France at the outbreak of war with England in 1242, Matthew Paris describes his conduct as an outrage on the ancient dignity of France, and Henry III retaliated. By the Statute of Staples in 1354, 27 Ed. III, it was provided that foreign merchants, on the breaking out of war with their country, should have forty days in which to depart with their goods, and forty more if prevented by accident from availing themselves of the first grace, with liberty to sell their goods. An ordinance of Charles V of France gave foreign merchants,

trading in France at the time of a declaration of war, liberty to depart freely with their effects. And by a treaty of 1483 between Louis XI and the Hanse Towns merchants of the latter were allowed to remain in France for a year after a war should break out, with protection for their persons and goods[1]. Later, treaties became common by which not only the merchants but all the subjects of the contracting states were allowed to withdraw themselves and their property from the respective countries in the event of war between them. Bynkershoek, who thought that the law remained unaltered in the absence of treaty, was able to give a list of such[2]; and Hall has added a list of such, concluded since the middle of the eighteenth century, in which the time allowed for withdrawal and arrangement of affairs varies from six months to a year. But the modern practice goes further. A right of residence during good behaviour, with safety to their effects, was allowed to French and Spanish subjects respectively by the British declarations of war in 1756 and 1762, and Hall has given a list of treaties, beginning with that of 1795 between Great Britain and the United States, in which that right is stipulated[3]. Of course no treaty can bind a government to allow foreigners to remain in the country during war if it believes that such a course would be dangerous to the state, either from reasonable suspicion entertained of individuals or from the special circumstances of the case as affecting classes of persons. No general stipulations would be interpreted as contemplating such a case, and no special stipulations restricting the power of a government in such a case can be imagined. The French government in 1870 was therefore within its right in expelling Germans from the department of the Seine and requiring them either to leave France or to retire to the south of the Loire, whatever may be thought of the real necessity for any such measure.

Permission to enemy subjects to remain in the country, even if in the express words of a treaty it should happen to stand alone, must in common sense carry with it permission to enjoy

[1] These examples are quoted by Twiss—*War*, §§ 49, 50.

[2] *Quæstiones Juris Publici*, l. 1, c. 3. He says that *utilitas fere jus belli quod ad commercia subegit.*

[3] Hall, § 126; Twiss—*War*, § 47.

their property while so remaining. And if enemy subjects being in the country may enjoy their property, it would be inequitable to confiscate that of those who are not in it and therefore as individuals cause no danger. This has been admitted by the conclusion of many treaties in which it is expressly stipulated that the debts, shares in public funds or in companies, and monies in banks of the respective subjects shall not be sequestered or confiscated in case of war[1]. The system of the treaties may therefore be deemed to amount to a general agreement, on the part of governments, that modern international law forbids making prisoners the persons or confiscating the property of enemy subjects in the territory at the outbreak of war, or, saving the right of expulsion in case of apprehended danger to the state, refusing them the right of continued residence during good behaviour. When in 1803 Napoleon ordered the arrest of all British subjects in France and the Italian Republic, he did not claim to do so on the general ground of their enemy character, but put the measure as one of retorsion for the capture of French merchant ships before declaration of war, an excuse which was not justified in view of the then customary character of that practice. The latest measures of interference with enemy property on land, as such, that have been resorted to by governments appear to be the laws as to debts due to British subjects passed by certain of the American colonies after their declaration of independence[2], and the Danish ordinance confiscating debts due to British subjects on the outbreak of war in 1807. Since the Confederate States of America never became a recognised member of the family of nations, the act of their congress in 1861, confiscating all

[1] Among these may be mentioned the treaties of the United States with Great Britain, 1795, 6 De Martens, R., 358; France, 1800, 7 De M., R., 484; and Peru, 16 De Martens, N. R., i. 132; those of France with Honduras, 1856, ib. ii. 150, and New Granada, 1857, ib. ii. 164; and that of the Zollverein with Mexico, 1855, ib. ii. 260.

[2] It was only North Carolina that went to the full extent of confiscation on the ground of enemy property. Georgia made an exception for debts due to persons residing in Great Britain, which may indicate that the action taken against the loyalists in the state was grounded on their conduct being considered rebellious; and in Virginia the debts were only sequestered.

property except public stocks and securities held within their limits by alien enemies, including persons domiciled in the enemy's country, need scarcely be admitted as another instance.

But the courts of law have not been unanimous in their judgments on the subject. The confiscating law of North Carolina and the sequestrating law of Virginia were held in 1796, by the Supreme Court of the United States, to have been within the rightful powers of those states, but to have been annulled by the stipulation in the treaty of peace of 1783, that creditors on either side should meet with no lawful impediment to the recovery of the full value of their *bona fide* debts[1]. On the other hand the court of King's Bench in 1817, under the guidance of Lord Ellenborough, exacted payment over again from a Danish debtor to his British creditor of a debt which he had paid to the Danish government under its ordinance of 1807, describing the latter as a measure "not conformable to the usage of nations, and which therefore they [the parties] could not expect, nor are they or we bound to regard[2]." In appreciating this judgment it must be remembered that, since the date of the American laws, a quarter of a century filled with numerous European wars had put the court on firmer ground for declaring the usage of nations in the matter. In the mean time the Supreme Court of the United States, under the guidance of Chief Justice Marshall, had held that the outbreak of war with Great Britain in 1812 did not of itself vest in the United States government the property in timber on land belonging to British owners, although it would have been competent to congress to enact its confiscation[3]. Lastly Dr Lushington in 1854, after stating that during the American war, but not since, there were instances in which enemy property on land was seized and condemned, not by the court of admiralty but by those of common law, added that no doubt the search for or seizure of such property "would be competent to the authority of the crown if it thought fit[4]." My own conclusion

[1] *Hamilton v. Eaton*, 2 Martin's North Carolina Reports 83, Scott 481; *Ware v. Hylton*, 3 Dall. 199, Scott 485.

[2] *Wolff v. Oxholm*, 6 M. and S. 92, Scott 496.

[3] *Brown v. United States*, 8 Cranch 110, Scott 486.

[4] In the *Johanna Emilie*, Spinks 14, Scott 498. And see what was said by Gibbs, C. J., in *Antoine v. Morshead*, below, p. 51.

is that the time is now fully ripe when a British court should not lag behind the position taken by governments, but should boldly follow Lord Ellenborough[1].

The Doctrine of Non-Intercourse during War.

The doctrine of non-intercourse, stated broadly, is that the right of action by enemy subjects on existing contracts is suspended, that commercial intercourse with enemy subjects is prohibited, and that as a consequence no new contracts can lawfully be made between the subjects of mutually enemy states except in the cases, such as that of ransom bills[2], known as *commercia belli*. This is not incompatible with immunity for enemy subjects from the confiscation of their property and rights, indeed the doctrine that the enemy subject's right of action on contracts existing before the war is not abrogated but only suspended can only take effect so far as his rights under such contracts have not been confiscated, and therefore in the doctrine of non-intercourse as here stated we are dealing

[1] If the matter came before a British court on a seizure by the crown, since the crown cannot take property within the realm from its owner by an act of state not grounded in law, the question would be whether the existence of a state of war amounted to a license to the crown to seize and appropriate, or, which is the same thing, had already devested the enemy owner of the property, subject to the condition that only the crown could take advantage of such devesting. The question of international law would therefore arise as well on a British attempt to confiscate as on one by the enemy government, and the opinions of Lord Ellenborough and Dr Lushington would conflict on it. With regard to the case before Chief Justice Marshall, he evidently considered that under the constitution congress held the position in the matter which in England is held by the crown, and consequently that the United States being a party to the suit through the act of some official was not conclusive as to the line taken by his government, although congress had by international law a license to direct seizure and appropriation.

[2] Abroad the enemy captor is allowed to sue on a ransom bill, while in England it is enforced through an action brought by the hostage for the recovery of his freedom, as was decided in *Anthon v. Fisher*, Douglas 650, note, to be necessary on account of the stringency of the rule against suit by an enemy subject. But this is matter of form. The contract, all the same, is one made during the war with an enemy subject, and enforced as arising from the necessities of war.

with a stage in which the ancient principles have already been modified, at least in practice. But since the disuse of confiscation has been accompanied by a growing disuse of the attribution of the enemy character to individuals, which attribution was equally the historical base of the doctrine of non-intercourse, we shall not be surprised to find that doubt about the latter rule has also begun to creep in. That it has not done so with more strength seems to have been due to the circumstance that the question as to the rights involved is usually one for courts of law, the conservative tendency of which has been pointed out[1].

There are in fact two contrasted opinions. One is that the non-intercourse doctrine is now obsolete, that there is no general objection to contracting with enemy subjects, and that the remedies of such subjects on their contracts are not suspended, except when and so far as a government may deem itself obliged by the circumstances of the war expressly to prohibit intercourse with them[2]. This opinion of course leaves it open to the courts of law to pronounce a contract illegal which in their judgment amounts to a participation by a subject in a war against his country, as the Prussian criminal court in 1871 held the participation of the Berlin banker Güterbock in the French war loan known as the Morgan loan to be not only illegal but treasonable. And on the same principle a court may refuse to entertain an action on a contract made for the purposes of a war against the country, notwithstanding that such contract was legal when and where made[3]. But the opinion that there is no general objection to contracting with enemy subjects, if adopted by the British courts, would leave their government less able than some may be to protect itself by special prohibitions, for the British crown has no power to issue such, so

[1] Above, p. 38.

[2] In this sense Heffter, § 123; Lueder, in Holtzendorff's *Handbuch des Völkerrechts*, vol. 4, p. 358; Rivier, *Principes du Droit des Gens*, t. 2, p. 231.

[3] Contracts made in the Confederate States for the purposes of their war against the United States were held not to be enforceable either in the courts of the latter or in those of the states where they were made after their reconquest. *Ware v. Jones*, 61 Alabama 288, Scott 517, and the other cases quoted in it or in Scott.

that the assistance of Parliament would be necessary where the contract did not amount to a participation in the war but was objected to on the ground of expediency.

The other opinion, which is that of the courts in England and the United States, is that the doctrine of non-intercourse as stated at the opening of this section continues in force, and that it is relaxations of it which require to be expressly made by governments[1]. For such relaxations the British crown is not so helpless as it is for prohibitions, since it can grant licenses for oversea trade in time of war, which operate as instructions to its cruisers not to interfere with the trade so licensed. Such instructions directly bind the prize jurisdiction, and the British courts of general jurisdiction recognise contracts made in the course of the licensed trade as lawful[2]. As historical examples of licenses it may be mentioned that during the Crimean war both Great Britain and France, the former by an order in council of 15 April 1854, permitted their subjects to trade with non-blockaded Russian ports, if in neutral vessels and not in articles of contraband, and Russia, by a declaration of 9 April 1854, allowed goods belonging to British and French subjects to be imported in neutral vessels; also that during their war with China in 1860 both Great Britain and France expressly permitted their subjects to continue their trade with that empire. The opinion now under consideration is maintained in practice in France[3], but we must proceed to notice more particularly the decisions of the courts in England and the United States.

[1] In this sense, Geffcken, notes to Heffter, § 123; Calvo, §§ 1682, 1708; and the well known words of Bynkershoek, *Quæstiones Juris Publici*, l. 1, c. 3—*quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita ipsæ declarationes bellorum satis declarant.*

[2] E.g., for insurance; *Flindt v. Scott*, 5 Taunton 674, Scott 526.

[3] *Le principe absolu*—that of this second opinion—*pour tous les contrats, tels que associations, assurances, négociations d'effets de commerce, même pour la correspondance directe, postale ou télégraphique, sous la sanction de la saisie des objets des conventions, a été édicté dans une circulaire du ministre de la marine de France en* 1870; Despagnet, § 517 C. To the special permissions mentioned in the text, France and Russia during the Crimean war added one for their respective subjects to communicate with one another by telegraph: Calvo, § 1685.

The doctrine that an enemy subject's right of action is suspended on those contracts made before the war which the war does not dissolve, but revives at the peace, may be seen in *Exp. Boussmaker*, 13 Ves. 71, Scott 494, where Lord Chancellor Erskine allowed the claim of an enemy creditor in a bankruptcy to be entered, in order that the fund might not be divided among the other creditors, but reserved the dividend.

The doctrine as to new contracts with enemy subjects was thus expressed by Lord Stowell in *The Hoop*, 1 C. Rob. 196, Scott 521: "In my opinion there exists a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy unless with the permission of the sovereign is interdicted." But Chief Justice Gibbs, in *Antoine v. Morshead*, 6 Taunton 332, Scott 573, expressed himself as follows: "A contract made with an alien enemy in time of war, of such a nature that it endangers the security or is against the policy of this country, is void. Such are policies of insurance to protect an enemy's trade." This might be read as an adoption of the former of the two opinions above contrasted, reserving to the court the liberty of treating a contract with an enemy subject as illegal from the circumstances, as was done by the Berlin court in Güterbock's case. But the judgment as a whole will not bear that interpretation. A bill of exchange had been drawn by one of the British subjects detained as prisoners in France by Napoleon, for money which he required for his subsistence, and was sued on after the peace by the French indorsee. The plaintiff succeeded, evidently because the case fell within the principle of the *commercia belli*. "How," said Gibbs, C. J., "was the payee to avail himself of the bill except by negotiating it, and to whom could he negotiate it except to the inhabitants of that country in which he resided?" At the same time he intimated that the king might have laid hands on the debt and sued on the indorsement during the war, and that the indorsee could only sue because of the peace. He also laid stress on the fact that the drawer and drawee were both British subjects, and slurred over the fact that the indorsing was a contract. His dictum therefore does not indicate that he really differed from the general understanding, namely that what was laid down by Lord Stowell for the maritime jurisprudence

of England is true of English law generally[1]. And the contract in *Antoine v. Morshead*, coming as it fairly did within the exception of *commercia belli*, was not in my opinion one on which the king could have sued or on which the remedy was suspended.

The doctrine that when a contract made previous to the war with one who becomes an enemy subject requires to be further acted on, not merely the remedy on it is suspended but it is dissolved, because "it is unlawful to have communication or trade with an enemy," was laid down in the state of New York and applied to commercial partnerships by Chancellor Kent, in *Griswold v. Waddington*, 16 Johnson 438, Scott 504[2]. It was applied by the Supreme Court of the United States, a minority dissenting, to policies of life insurance; and the insured was held entitled to sue after the peace for the equitable value of his policy, "as of the day when the first default occurred in the payment of the premium by which the policy became forfeited," with interest "from the close of the war": *New York Life Insurance Company v. Statham*, 93 U. S. 24, Scott 512. Its application to the relation of landlord and tenant was refused in the state of Massachusetts, and the landlord was allowed to sue after the close of the war for the unpaid rent: *Kershaw v. Kelsey*, 100 Mass. 561, Scott 535.

It has been held in the United States that a statute limiting the time within which an action can be brought does not run while the right of action was suspended by war: *Hanger v. Abbott*, 6 Wallace 532, Scott 500. And this seems reasonable, but a contrary opinion has been expressed by English writers of high authority[3].

It has also been held in the United States that no interest

[1] In *Potts v. Bell*, 8 T. R. 548, Scott 525, Lord Kenyon said that "it was a principle of the common law that trading with an enemy without the king's license was illegal in British subjects."

[2] In *Matthews v. Mc Stea*, 91 U. S. 7, Scott 508, it was held that a partnership was not dissolved by the outbreak of the civil war, an act of congress and a proclamation by the president under it having fixed a later date for the cessation of commercial intercourse.

[3] Anson on *Contracts*, 10th edition, p. 120; Lindley on *Companies*, 6th edition, v. 1, p. 53, note; Pollock on *Contracts*, 6th edition, p. 92, quoting from *De Wahl v. Braune*, 1 H. and N. 178 and 25 L. J., N. S., Ex. 343, a passage only occurring in the latter report.

can be recovered after the peace for the time during which the debtor was prevented from paying the principal by the legal doctrine that all commercial communication with enemy subjects is forbidden: *Hoare v. Allen*, 2 Dallas 102, Scott 498; *Foxcroft v. Nagle*, 2 Dallas 182, Scott 500, and see C. N. Gregory in 25 *Law Quarterly Review* 297, 314. But this rule does not apply when the creditor resides or has an agent in the country of the debtor, for then the debtor might have paid the interest, and it would not have been his offence if it has been sent to the enemy country; *Conn v. Penn*, 1 Peter C. C. 496; *Denniston v. Imbrie*, 3 Washington C. C. 396. But the agent must have been appointed before the war: *U. S. v. Grossmayer*, 9 Wallace 72. See also *Small's Administrator v. Lumpkin's Executor*, 28 Grattan 832, Scott 538.

The shares and debentures of companies incorporated under British law which are held by enemy subjects at the outbreak of a war will not cease to exist, but must continue as properties, whatever be decided as to the ownership of those properties. There is therefore no alternative but either to confiscate them for the benefit of the British government, which in many cases would be contrary to treaty[1] and in all cases is now out of the question, or to regard the enemy shareholders and debentureholders as continuing to be such. To strike out the enemy subjects from the lists of persons interested, without more, would practically be to confiscate their properties for the benefit of the other shareholders, a proceeding which would be grotesque in its injustice, and which would fall within the spirit if not within the letter of treaties prohibiting confiscation. But the dividends on the shares and the interest on the debentures, so far as not represented by coupons payable to bearer and of which therefore the ownership would not be apparent to the companies, cannot be paid to the enemy subjects during the war. After its close they will be entitled to claim the back dividends and interest, but not to interest on debentures after their maturity, subject, in the case of shareholders, to their paying any calls made in the mean time[2]. And the

[1] See above, p. 46.

[2] Compare the reservation of the dividend in *Exp. Boussmaker*, above, p. 51.

prohibition of commercial intercourse with enemy subjects will during the war prevent the shareholders from exercising voting powers, while the enemy directors, who cannot continue to fill their places while their duties would be in suspense, must be regarded as deprived of that character from the outbreak[1].

Lastly, we shall see that for purposes of maritime capture the enemy character of property is not decided in England by the nationality of the owner, but by his domicile in a peculiar sense, differing considerably from ordinary domicile, which is known as trade domicile in war, but is equally applicable to persons not engaged in trade. The analogy, as well as reasons of convenience, suggests that in all this section enemy subjects or directors should be understood as those persons, whatever their nationality, who have such a domicile in the enemy's country and no others. See Treby, C. J., in *Wells v. Williams*, 1 Raym. 282, 1 Salk. 46, and Lord Lindley in *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 505. "In the case of *Clarke v. Morey*, 1813, 10 Johnson 69, it was held by Kent, C. J., that aliens residing in the United States at the time of war breaking out between their own country and the United States, or who come to reside in the United States after the breaking out of war under an express or implied permission, may sue and be sued as in time of peace; that it is not necessary for this purpose that such aliens should have letters of safe conduct or actual license to reside in the United States, but that license and protection will be implied from their being suffered to remain without being ordered out of the United States by the executive. See *Seymour v. Bailey*, 1872, 66 Ill. 288, where authorities are collected." Scott 545, note.

"The Supreme Court of the United States in the case of *McVeigh v. United States*, 11 Wall. 259, after citing *Albrecht v. Sussman*, 2 V. and B. 324, Bacon's Abridgment and Story's Equity Pl., § 53, for authority, says; 'Whatever may be the

[1] The conclusions in this paragraph agree with those of Mr Chadwick, in an article on *Foreign Investments in time of War*, which appeared in 20 *Law Quarterly Review* 167–185, and has since been separately published. Only he draws a distinction for what he calls "private companies," which appear to me too indefinite a class to make it wise to attempt treating them in a different manner from other incorporated companies.

extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued'": Wagner, J., delivering the opinion of the court in *De Jarnett v. De Giversville*, 56 Missouri 440, Scott 545. "It was likewise held in *McVeigh v. United States* that the right to be sued involved the right to appear in the suit, and inasmuch as the court refused McVeigh's appearance by counsel the judgment of the lower court was reversed": Scott 545, note.

The doctrine of non-intercourse during war has certainly not been affected, as a branch of English law, by the Art. XXIII (*h*) introduced in 1907 into the Hague Code of the Laws of War. But it will be well here to refer to that article and the comments on it, which will be found in this volume at pp. 79, 83.

CHAPTER III.

THE LAWS OF WAR IN GENERAL.

A WAR between civilised states is begun because one at least of the parties makes some demand with which the other does not comply, or some complaint of which the other gives no explanation regarded by the first as satisfactory. International law says its last word on that point when it pronounces the demand or the complaint to be legitimate or illegitimate, and, if possible, offers arbitration. If the parties are not content with this, the want of organisation in the world of states compels the law which was concerned with their dispute to stand aside while they fight the quarrel out, in obedience not to the natural law of philosophers, which is a rule prescribing conduct, but to that of the natural historian, which is a record of the habits of the species, good or bad. So far as the in this sense natural procedure of the human species is mitigated in the behaviour of the parties, that is due to the scope which they may allow to the better qualities of our mixed humanity, and to the influence of certain rules which the consent of nations has made a part of international law. These rules are always restrictive, never permissive in any other sense than that of the absence of prohibition, for law can give no positive sanction to any act of force of which it cannot secure the employment on the side of justice alone, even if the particular act be not one which the law would prohibit both to the just and to the unjust if it could. Whenever therefore in speaking of the laws of war it is said that a belligerent may do this or that, it is always only the absence of prohibition that must be understood.

This being so, the object on the part of each belligerent is to break down the resistance of the other to the terms which he requires for peace. These are not necessarily limited to the concession of the demand or the satisfaction of the complaint out of which the war arose. They may include a demand for indemnity, for new arrangements promising greater security in future, or for new arrangements more pleasing to the stronger party for any other reason; and these may go so far as to include the cession of territory. That is to say, the natural man is likely so to expand the original cause of quarrel, and often the just man may do so, for indemnity, security, and the revision of territorial and other arrangements are all of them objects which may in given cases be legitimate. Even the extinction of the weaker state by conquest may be legitimate, if it is a state of which the habitual conduct and known aims make it certain that peaceful relations with it cannot safely exist. But it is only in very simple or flagrant cases that law can be in a position to appreciate the merits of the further objects developed in the course of a war, and even then it has no means of making its voice heard except by the intervention of some third power, which is as likely to be stimulated by interest as by justice. It has therefore nothing more to do than to accept the parties as they again present themselves to it, in the condition and with the relations which they have determined for themselves in concluding peace.

The means which may be employed in war are limited, first, by certain prohibitions, such as those of poison and treachery, which, although they are not recognised by all savages, have been handed down immemorially among all peoples having any degree of civilisation. Secondly, by the principles which are expressed as follows in the preamble to the Declaration of St Petersburg, 1868:

> Considering that the progress of civilisation should have the effect of alleviating as much as possible the calamities of war;
>
> That the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which

uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would therefore be contrary to the laws of humanity.

The only application of these principles which is made by the Declaration is that

The contracting parties engage mutually to renounce in case of war among themselves the employment by their military or naval troops of any projectile of a weight less than 400 grammes [about 13½ ounces] which is either explosive or charged with fulminating or inflammable substances.

The limitation of weight corresponds to the penultimate clause of the preamble, an explosive cannon ball not falling within it because it may disable many men by its fragments, but an explosive rifle ball falling within it because it would aggravate the sufferings and cause the useless death of the one man whom it can disable. But that clause may be capable of other applications, and although the Declaration limits its obligation to the case of war between the contracting parties, it can scarcely be doubted that not to employ arms inflicting useless suffering on men who are disabled is a duty in all wars, even against savages. And the same must be said of observing the immemorial prohibitions previously mentioned. All these precepts concern acts which would degrade the doer, whoever was his opponent.

The same however cannot be said of the wider principle expressed by the second clause of the St Petersburg preamble. Since in a war between civilised states the object is to break down the resistance of the enemy government, measures not aimed at the military forces of that government or the organisation and wealth which support them would exceed the object and be inhuman. And the advance of public opinion has even condemned all action in war the connection of which with the weakening of the enemy's military forces is not proximate. Slaughter of non-combatants or carrying them off as prisoners, and the devastation of territory not necessary for covering the retreat of an army or for any other directly military purpose, but intended to create general terror or distress, may indeed help to break down resistance but are universally condemned.

Here we encounter the principle which we have already pointed out as now governing war in its military aspect, namely that an individual is not an enemy, or therefore to be affected, further than it may be necessary, in the strict sense or practically, for the purpose of the war to identify him with his state. But often the inroads or other outrages committed by savages or half civilised tribes can only be repressed by punitive expeditions, in which the whole population must suffer for want of a government sufficiently marked off from it. All civilised states which are in contact with the outer world are, to their great regret, familiar with such expeditions in their frontier wars, and the principle that to weaken the military forces of the enemy is the only legitimate mode of action can have no application to them. But no humane officer will burn a village if he has any means of striking a sufficient blow that will be felt only by the fighting men.

After the immemorial prohibitions and the principles which in the St Petersburg preamble have received the highest expression yet officially given to them, we come in the third place to those rules as to particular matters which up to the present have been fortunate enough to command general assent. The first occasion on which any of these were embodied in a conventional form aspiring to be general was that of the Declaration of Paris in 1856, which related only to maritime war. Then, in 1863, came the *Instructions for the Government of Armies of the United States in the Field*, prepared by Dr Francis Lieber, revised by a board of officers, and issued by authority for use during the great civil war: they immediately acquired a high scientific reputation, as well for their excellence as from the novelty of such a comprehensive codification of the laws of land war. Next came the turn of the sick and wounded. The maxim *hostes dum vulnerati fratres* is old, and in support of it many particular conventions were concluded, but the condition of the wounded was still so terrible that, when a picture of it was given by the Swiss philanthropist M. Dunant in his book *Un Souvenir de Solferino*, a movement of humanity was aroused which led to a conference invited by Switzerland. Its result was the first general convention on the subject, that of 1864, the *Convention of Geneva for Ameliorating the condition of the*

Wounded in Armies in the Field; and at a further conference held at Geneva in 1868 *Additional Articles*, chiefly relating to maritime war, were agreed on, but were not ratified by the powers represented.

In 1874 the laws of land war as a whole were for the first time submitted to an official conference, which sat at Brussels and drew up a code largely based on the work of Dr Lieber; but this again was not adopted by the powers in any binding form. And in 1880 the Institute of International Law adopted a *Manual of the Laws of War on Land*, in which some improvement on the Brussels code was attempted[1]. But the crowning work is the *Regulations respecting the Laws and Customs of War on Land*, first annexed to the convention on the subject which was concluded at the Hague Conference of 1899, and to which, in the amended form given both to the convention and to the regulations at the Hague Conference of 1907, nearly all the states in the world have become parties, though in a few cases with some reservation. The Regulations as they now stand refer, but without repeating them, to the Geneva Convention of 1906 *for the Amelioration of the condition of the Wounded and Sick in Armies in the Field*, itself based on the Articles of 1864 and 1868, and to "the prohibitions provided by special conventions," therefore to the operative part of the Declaration of St Petersburg but not to its preamble; they thus amount to a code of the laws of land war so far as yet officially sanctioned. Besides these, the Hague Conferences have produced declarations and conventions on special points or parts of the subject, and a

[1] The documents thus far mentioned may be consulted in a number of publications, but perhaps most conveniently in the appendixes to the 2nd volume of Lorimer's *Institutes of the Law of Nations*, which bring together, besides the internationally binding ones, the *United States (Lieber's) Instructions*, the *Code of the Brussels Conference* with the report on it by the British delegate, Sir A. Horsford, the *Manual of the Institute* (which is in 5 *Annuaire* 157), and the *Additional Geneva Articles of* 1868. We gladly take the opportunity of directing the attention of our readers to the work of so deep a thinker as the late Professor Lorimer. The internationally binding ones to date, including the unratified *Declaration of London* of 1909, are to be found in Dr Higgins's *The Hague Peace Conferences*, 1909, and in Professor Oppenheim's *International Law*, vol. 2, *War and Neutrality*, 2nd edn., 1912, of which the former includes the Brussels code of 1874.

Convention for the adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1864.

It is important to note the precise authority and range of the Hague Regulations as intended by their framers and now a matter of international compact. In the preamble to the convention to which they are annexed the High Contracting Parties say that the provisions which they have adopted, "the wording of which has been inspired by the desire to diminish the evils of war as far as military necessities permit, are intended to serve as a general rule of conduct for belligerents in their relations with each other and with populations." Therefore military necessity has been taken into account in framing the Regulations, and has not been left outside them, to control and limit their application in the circumstances which they embrace. The preamble then proceeds as follows:

It has not however been possible as yet to agree on provisions embracing all the circumstances which occur in practice. On the other hand it could not be intended by the High Contracting Parties that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of military commanders. Until a more complete code of the laws of war is issued the High Contracting Parties think it right to declare that, in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and rule of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience. They declare that it is in this sense that especially Articles 1 and 2 of the Regulations adopted must be understood.

The authority of the Hague Regulations is therefore supreme to the extent of their range, and their range, wherever it may be found defective, is to be supplemented by approved usage and humanity. The convention proceeds:

ART. 1. The parties shall issue to their armed land forces instructions conformable to the Regulations.

ART. 2. The provisions contained in the Regulations or in the convention are applicable only between the contracting powers, and if the belligerents are all parties to the convention.

ART. 3. A belligerent party which violates the Regulations shall be liable to make compensation if the case demands it. It shall be responsible for all acts committed by the persons forming part of its armed forces.

ART. 8. In the event of one of the parties wishing to denounce the convention, the denunciation shall not take effect until a year after a notification of it shall have been made in writing to the government of the Netherlands, which shall immediately communicate it to all the other contracting powers.

These articles show an intention to place the obligation of the Regulations on a contractual footing; an intention very suitable to the first step in a codification on so large a scale. All the same, the general adoption of the Regulations even on that footing is a testimony rendered by the society of states to their practical and not excessive character, which, if they should not be denounced by any state, must before long cause them to rank as a whole among the laws of that society, as much of them already does through the effect of custom and approval. So far as they embody the dictates of humanity, interpreted with due regard to the difficulties which have been already noticed as occurring in dealings with uncivilised tribes, their obligation already extends beyond the wars of the society of states. In the mean time the possession of such an official document is a fact of so great value, both for the theoretical discussion of the laws of land war and for the inculcation of them on governments and commanders charged with the direction of war, that it seems better to keep it prominently before students and the public by taking the Hague Regulations as our text, in their own order, than to seek any other arrangement for their matter on the chance of its being scientifically better. I shall refer to them in the following chapters as Hague (or H) I, II, &c., and to the unratified articles of the Brussels conference, which it will often be interesting to compare in order to mark the advance of 1899 or 1907 over 1874, as Brussels (or B) I, II, &c.

One point remains to be mentioned. It has been said by a very able writer that the contractual laws of war consented to by a state do not bind the insurgents in case of a civil war arising in that state, because, not being a distinct international person, they cannot have become parties to its treaties[1]. With this opinion we cannot agree. The question can only arise with regard to insurgents treated as belligerents, and

[1] Pillet, *Lois Actuelles de la Guerre*, p. 31.

certainly no body of men would be invested with that honourable character, either by the government against which they rose or by third parties, if it was considered that they revolted not only against measures internal to their state, but against the ties binding their state to the world in matters so vitally affecting civilisation as the laws of war. And when to this consideration is added the difficulty of determining which of those laws, notwithstanding the contractual form which may have been given to them, may justifiably be deemed to rest on a broader foundation, we must hold that belligerent insurgents cannot stand on a different footing as to any part of the laws of war[1] from that occupied by their state at the commencement of the insurrection.

[1] Pillet illustrates his doctrine by a reference to the Declaration of Paris, the part of which prohibiting the capture of neutral property under the enemy flag he considers to be law independently of any convention, and therefore to be such as he admits would bind insurgents. But his own country has been in its history far from taking that view of the rule in question. Compare what we have said as to the obligation of international law on new states, in our volume on *Peace*, p. 49.

CHAPTER IV.

THE LAWS OF WAR ON LAND, BEING THE HAGUE REGULATIONS WITH A COMMENTARY.

[The Hague Regulations are distinguished in this chapter by italics.]

Section I—On Belligerents.

Chapter I—On the Qualification of Belligerents.

ART. I. *The laws, rights and duties of war apply not only to armies but also to militia and volunteer corps fulfilling the following conditions:*

After the old formula of *courir sus* had ceased in practice to launch all the subjects of a prince into hostilities against his enemies, it became the military fashion to regard professional soldiers as alone entitled to fight, any other persons who presumed to contend with them doing so at the peril of their lives without any protection from the usages of war. Thus "in 1742 the Austrians excluded the Bavarian militia from belligerent rights," and "it became the habit to refuse the privileges of soldiers not only to all who acted without express orders from their government, but even to those who took up arms in obedience to express orders when these were not addressed to individuals as part of the regular forces of the state[1]." In the capitulations of Quebec in 1759 and Canada in 1760 the militia were not left to the mercy of the English general only because

[1] Hall, §§ 179 and 178, quoting in support of the latter statement the proclamations of the Austrians with regard to Provence in 1747 and to Genoa in 1748, and those of the French with regard to Hanover in 1761 and Newfoundland in 1762.

it was "customary for the inhabitants of the colonies of both crowns to serve as militia[1]." And as late as 1870, notwithstanding that public opinion had been slowly gaining ground in favour of irregulars, the Prussian commander-in-chief required that "every prisoner, in order to be treated as a prisoner of war, shall prove that he is a French soldier by showing that he has been called out and borne on the lists of a military organised corps, by an order emanating from the legal authority and addressed to him personally[2]." This bad custom, which gave an unfair advantage to the nations most lavishly providing themselves during peace with the standing means of war, was condemned by B IX, reproduced as above by H I.

1. *To have at their head a person responsible for his subordinates*[3]*;*

The Russian draft of B IX added to this the condition that the person commanding should be subject to orders from headquarters, but that addition was not maintained in the text adopted for B IX, and therefore must not be understood here. Probably the responsibility intended is nothing more than a capacity of exercising effective control.

2. *To have a fixed distinctive emblem recognisable at a distance;*

The Prussians in 1870 and the French law of 20 August 1870 for the National Guard required the distinctive character to be recognisable at the distance of rifleshot, but this, if it ever could have been a requirement internationally valid, would certainly not be so now that the range of rifleshot has become so great.

3. *To carry arms openly; and*

4. *To conduct their operations in accordance with the laws and customs of war.*

This must mean "generally to conduct" &c. A few breaches of the laws and customs of war by individuals would not disqualify a corps.

In countries where militia or volunteer corps constitute the army or form part of it, they are included under the denomination army.

[1] Hall, § 179.

[2] Hall, § 178.

[3] This continues H I as above, p. 64.

ART. II. *The population of a territory which has not been occupied who, on the enemy's approach, spontaneously take up arms to resist the invading troops without having time to organise themselves in accordance with Art. I, shall be regarded as belligerents if they carry arms openly and respect the laws and customs of war.*

H II reproduces B X, with the addition in 1907 of the condition to carry arms openly. At Brussels the weaker states opposed B IX and X as unduly restricting the right of patriotic resistance to invasion, which was important to them in proportion to their inferiority in standing military preparation. This opposition was renewed at the Hague in 1899 to H I and II, and with a view to its satisfaction the passage in the preamble which has been quoted on p. 61 was inserted on the proposition of the Russian delegate M. de Martens, and was accepted by the delegates of the states in question and by the British delegate who had sympathised with them, with the exception of Switzerland, which did not immediately sign the Hague convention of that year respecting the Laws and Customs of War on Land. Those who study closely the passage in the preamble will perceive that, since it applies only to cases not included in the Regulations, it does not profess to relax those Regulations as operative in the cases which they include; and they may wonder how it produced the assuaging effect which it is recorded to have produced. The answer must be that, in large diplomatic gatherings as well as in the British parliament, words are sometimes adopted from an appreciation more of their spirit than of their meaning. Only, while an act of parliament is construed in accordance with the meaning of its words, by judges who can have no cognisance of the spirit which animated the members of the legislature, the methods of diplomacy are looser, and the preamble to the convention may be considered as deprecating a literal interpretation of H I and H II[1].

ART. III. *The armed forces of the belligerent parties may consist of combatants and non-combatants. In case of capture by the enemy both have a right to be treated as prisoners of war.*

[1] The incident is recorded in the report of the British military delegate, Sir John Ardagh, in the Bluebook "*Miscellaneous, no.* 1, 1889"—*c.* 9534—pp. 160, 161.

The persons who form part of the armed forces though non-combatants are such as chaplains, quartermasters, persons in the commissariat, and doctors and persons in the sanitary service except so far as protected by the Geneva convention. They are contrasted with the "individuals who follow an army without directly belonging to it," who are dealt with in H XIII.

Chapter II—On Prisoners of War.

ART. IV. *Prisoners of war are in the power of the hostile government, but not in that of the individuals or corps who captured them.*

They must be humanely treated.

All their personal belongings, except arms, horses and military papers, remain their property.

ART. V. *Prisoners of war may be interned in a town, fortress, camp or any other locality, and bound not to go beyond certain fixed limits; but they can only be confined as an indispensable measure of safety, and* [added in 1907] *only while the circumstances which necessitate the measure continue to exist.*

At the Hague in 1907 a discussion took place on the confinement of a population or portions of it in what in Cuba and South Africa were known as concentration camps, which was remarkable for the opinion expressed by the eminent Belgian delegate M. Beernaert that Arts. III and V are to be construed as covering the whole ground of internment, so that no concentration not authorised by them is allowable. I cannot subscribe to this. The articles in question only profess to relate to the armed forces of the belligerent parties.

ART. VI. *The state may utilise the labour of prisoners of war, other than officers* [1907], *according to their rank and aptitudes. Their tasks shall not be excessive, and shall have nothing to do with the operations of the war.*

Prisoners may be authorised to work for the public service, for private persons, or on their own account.

Work done for the state shall be paid for according to the rates in force for soldiers of the national army employed on

similar tasks, or [1907] *if there are none such, at rates suitable to the work done.*

When the work is for other branches of the public service or for private persons, the conditions shall be settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance.

The first clause of H VI is an advance on B XXV, which said that the work required from prisoners should have no direct connection with the operations on the theatre of war. For instance, they are not now to be used in constructing fortifications even before the theatre of war has reached them.

ART. VII. *The government into whose hands prisoners of war have fallen is bound to maintain them.*

Failing a special agreement between the belligerents, prisoners of war shall be treated, as regards food, quarters and clothing, on the same footing as the troops of the government which has captured them.

ART. VIII. *Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the state into whose hands they have fallen.*

Any act of insubordination warrants the adoption, as regards them, of such measures of severity as may be necessary.

Escaped prisoners, recaptured before they have succeeded in rejoining their army, or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment.

Prisoners who after succeeding in escaping are again taken prisoners are not liable to any punishment for the previous flight.

H VIII omits from B XXVIII the express permission to use arms against a prisoner attempting to escape, after summoning him, but to fire on him would certainly remain allowable. The disciplinary punishment mentioned is not understood to include death, but plots, rebellion or riot would bring a prisoner under the former part of the article, and the penalty of death might be incurred for them.

ART. IX. *Every prisoner of war, if questioned, is bound to declare his true name and rank, and if he disregards this rule he is liable to a curtailment of the advantages accorded to the prisoners of war of his class.*

ART. X. *Prisoners of war may be set at liberty on parole if the laws of their country authorise it, and in such a case they are bound on their personal honour scrupulously to fulfil the engagements they have contracted, both as regards their own government and the government by which they were made prisoners.*

In such cases their own government is bound not to require of or accept from them any service incompatible with the parole given.

"In the British army only commissioned officers are allowed to give their parole for themselves or their men": Holland, *Laws and Customs of War on Land*, p. 14. "And even officers, so long as a superior is within reach, can only give their word with his permission. Finally, the government of the state to which the prisoners belong may refuse to confirm the agreement when made; and if this is done they are bound to return to captivity, and their government is equally bound to permit, or if necessary to enable, them to do so." Hall, § 133.

The terms of the parole are a matter of contract, as will be seen to result from H XI. The usual terms are that the prisoner, unless exchanged, will not serve during the existing war against the captor or his allies engaged in the same war; and this is understood to refer only to active service in the field, and not to debar the paroled prisoners from performing military or administrative duties of any kind at places not within the seat of actual hostilities. The parole is in any case terminated by the conclusion of peace, and if it was given for a specified period, during which peace is concluded and war again breaks out, its obligation will not revive.

ART. XI. *A prisoner of war cannot be forced to accept his liberty on parole; similarly the hostile government is not obliged to assent to the prisoner's request to be set at liberty on parole.*

ART. XII. *Any prisoner of war who is liberated on parole, and recaptured bearing arms against the government to which he had pledged his honour, or against the allies of that government, forfeits his right to be treated as a prisoner of war, and can be brought before the courts.*

These are the military courts.

ART. XIII. *Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands, and whom the latter thinks fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying.*

Foreign officers acting as *attachés* or as correspondents are bound by the neutrality of their own state to take no part in directing the movements of the army which they follow.

ART. XIV [details added in 1907]. *A bureau for information relative to prisoners of war is instituted, on the commencement of hostilities, in each of the belligerent states and, if the case happens, in the neutral countries on whose territory belligerents have been received. The duty of this bureau being to answer all inquiries about them, it is furnished by the various services concerned with all the necessary information respecting internments, transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths or other, necessary to enable it to make out and keep up to date an individual record for each prisoner of war. The bureau must state in this record the regimental number, surname and name, age, place of origin, rank, unit, wounds, date and place of capture, of internment, of the wounds and the death, as well as all special observations. The individual record shall be handed to the government of the other belligerent after the conclusion of peace.*

It is also the duty of the information bureau to gather and keep together all objects of personal use, valuables, letters, &c., found on the battlefields or left by prisoners who have been released on parole or exchanged, or who have escaped or died in hospitals or ambulances, and to transmit them to those interested.

ART. XV. *Relief societies for prisoners of war, regularly constituted in accordance with the law of their country with the object of serving as intermediaries for charity, shall receive from the belligerents for themselves and their duly accredited agents every facility, within the bounds of military requirements and administrative regulations, for the effective accomplishment of their humane task. Delegates of these societies may be admitted to distribute relief at places of internment, as also at the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an engagement in writing to comply with all regulations for order and police prescribed by the latter.*

ART. XVI. *The information bureau shall have the privilege of free postage. Letters, money orders and valuables, as well as postal parcels, destined for prisoners of war or dispatched by them, shall be free of all postal rates, alike in the countries of origin and destination and in those passed through.*

Gifts and relief in kind for prisoners of war shall be admitted free of all duties of entry and others, as well as of payments for carriage by railways worked by the state.

ART. XVII. *Officers taken prisoners shall receive the same pay as officers of the same rank of the country in which they are detained, the amount to be repaid by their government* [scale fixed in 1907].

ART. XVIII. *Prisoners of war shall enjoy every latitude for the exercise of their religion, including attendance at their own church services, provided only they comply with the regulations for order and police issued by the military authority.*

ART. XIX. *The wills of prisoners of war are received or drawn up on the same conditions as for soldiers of the national army.*

The same rules shall be observed regarding certificates of death, as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

ART. XX. *After the conclusion of peace the repatriation of the prisoners of war shall take place as speedily as possible.*

It is generally admitted that prisoners of war may be detained after the conclusion of peace until they have paid the

debts incurred by them during their captivity, and while they are serving out sentences of imprisonment pronounced against them for common law crimes. Whether they may be detained during terms of imprisonment imposed on them for disciplinary offences is a moot point. In principle such imprisonment is merely a modification of the captivity, therefore an incident of the war, and cannot continue after the peace has put an end to the exercise of warlike force and therefore to the captivity itself. The case is different from that of the condemnation by a court of admiralty, after the peace, of an enemy ship the title to which was complete by capture during the war, since there is then no new or continuing exercise of warlike force, merely the existing title is declared. On the other hand it is argued that disciplinary punishments imposed when the war was plainly nearing its end would not be deterrent if the peace terminated them, and it would be difficult at that stage of the war to keep the prisoners in order. In 1871 the Prussian government acted on this practical view, and France remonstrated but did not retaliate. Calvo (§ 2957) defends the French view, but Lueder is inclined to justify Prussia without controverting the principle[1]. At the Hague in 1899 the draft of H XX proposed by the Belgian delegate M. Beernaert contained a clause prohibiting the detention of a prisoner for condemnations pronounced or facts occurred since his capture, except common law crimes or offences; but the clause was struck out on the German technical delegate's objecting to it. Japan in 1905, after her war with Russia, released the prisoners who were serving disciplinary imprisonments[2]; and this appears to be the proper course to follow.

Chapter III—On the Sick and Wounded.

ART. XXI. *The obligations of belligerents with regard to the service of the sick and wounded are governed by the Geneva Convention.*

The reference is to the Geneva Convention of 1906, replacing one to that of 1864 in the article as drawn in 1899. It leaves

[1] In 4 *Holtzendorff's Handbuch*, pp. 806, 807.

[2] Oppenheim's *International Law*, vol. 2, 2nd edn., p. 336.

the work of Geneva standing as separate from that of the Hague, notwithstanding this adoption by the latter of the substance of the former. Thus, for instance, ratification or denunciation of the Geneva Convention must be addressed to the Federal Council of Switzerland, but of the Hague Convention to the government of the Netherlands. Since the Geneva articles relate to a very special part of international law, it will be sufficient here to summarise them, with the indication G.

General Provisions.

Wounded or sick soldiers and other persons officially attached to armies shall be respected and cared for, without distinction of nationality, by the belligerent in whose power they are: if he is obliged to abandon any of them to the enemy, he shall leave with the latter, so far as the military circumstances permit, a part of his medical *personnel* and material to contribute to their care: G 1. Subject to the right of the belligerents to make any special agreements with regard to them, those retained in the power of the captors will be prisoners of war, and the several provisions regarding prisoners will apply to them: G 2. After each engagement the party holding the field shall take measures to search for the wounded and to protect them and the dead, and shall take care that the bodies of the dead are carefully examined before they are buried or cremated: G 3.

G 4 provides for the exchange of marks or documents of identification, and of information concerning internments or other changes, entries into hospital and deaths, and for the collection and ultimate restoration of all objects of personal use, paper money and letters found on the field of battle, or left by the wounded or sick who have died in hospital.

"The military authority may appeal to the charitable zeal of the inhabitants to collect the wounded or sick of the armies and take care of them under its direction, granting special protection and certain immunities to those who have responded to such appeal": G 5. It is intended here, as it was said in Art. 4 of 1868, that the immunities thus promised, in the quartering

of troops and contributions, will only be in equitable proportion to the charitable zeal shown.

Both the mobile medical formations intended to accompany armies in the field and the fixed medical establishments, in common parlance respectively ambulances and base hospitals, shall be respected and protected by the belligerents: G 6. But this protection is lost if they are used to commit acts harmful to the enemy: G 7. Such are not considered to be the possession of arms and the use of them for defence; the being guarded, in default of armed orderlies, by a piquet or sentinels duly authorised; or the fact that arms or cartridges taken from the wounded and not yet handed over to the proper department are found in the ambulance or hospital: G 8.

The Personnel.

The medical *personnel* is defined as that employed exclusively in the collection, carriage, necessary defence and treatment of the wounded and sick, as well as in the administration of the ambulances and base hospitals. It is composed of the official service of the army and of the voluntary aid, popularly called Red Cross, societies which have been formed throughout the civilised world, and which, if they belong to neutral countries, must not only be authorised by their own governments but must also place themselves under the command and responsibility of one or the other belligerent flag, because even in the interest of humanity it is impossible to recognise any other authority than that of the belligerents within the area of contest. For the societies, whether of belligerent or of neutral countries, the previous notification by the party employing them to his enemy, that he accepts their service under his own responsibility, is also necessary. The *personnel* thus defined, together with the chaplains attached to armies, are to be respected and protected under all circumstances, and if they fall into the hands of the enemy are not to be treated as prisoners of war. The medical *personnel*, while in the hands of the enemy, are to receive from him the same pay and allowances as the persons holding the same rank in his own army, and shall continue to perform their duties under his

direction. When their assistance is no longer indispensable they shall be sent back to their army or to their country, at such time and by such route as may be compatible with military exigencies, and shall take with them the effects, instruments, arms and horses, which are their private property: G 9, 10, 11, 12, 13.

The Material.

Captured ambulances retain their material, subject to its temporary use by the captors for the treatment of the wounded and sick: G 14. The buildings and material of fixed establishments remain subject to the laws of war, but may not be diverted from their purpose so long as they are necessary for the wounded and sick, subject to the right of commanders in the field to dispose of them in case of important military necessities, first securing the needs of the wounded and sick who are found in them: G 15. The material of voluntary aid societies admitted to the benefit of the convention is considered private property, and as such is to be respected in all circumstances, saving the belligerent right of requisition: G 16.

The chapters on the *Personnel* and the *Material* are adapted to *Convoys of Evacuation* by G 17.

The Distinctive Emblem.

As a homage to Switzerland the distinctive emblem of the sanitary service of armies, which as used by persons is to be worn on the left arm and accompanied by a certificate of identity, is the heraldic sign of a red cross on a white ground, formed by interchanging the federal colours: G 18, 19, 20. The Red Cross flag of the Geneva Convention is only to be hoisted with the consent of the military authority, and is to be accompanied, when an ambulance or base hospital flying it is not in the power of the enemy, by the national flag of the belligerent to which it belongs or under which it is serving: G 21, 22. Neither the Red Cross emblem nor the words "Red Cross" or "Geneva Cross" can be used, whether in time of peace or in time of war, except to protect or to

indicate the medical formations and establishments, the *personnel* and the material, protected by the convention: G 23.

By exception, in order to obviate the mistakes which their respective subjects might make as to the meaning of the red cross, Turkey has been allowed to adopt a red crescent and Persia a red sun as her symbol, and Siam has reserved the right to adopt a Buddhistic symbol.

Commanders in chief of belligerent armies are to provide for carrying out the convention in detail, and for unforeseen cases, according to its general principles and to the instructions of their respective governments: G 25.

Section II—On Hostilities.

Chapter I—On the Means of Injuring the Enemy, Sieges and Bombardments.

ART. XXII. *The right of belligerents to adopt means of injuring the enemy is not unlimited.*

It will be appropriate to consider under this article certain prohibitions which have not been incorporated with the Hague Regulations, but which have emerged into definiteness from the somewhat fluid principle of humanity. They are contained in four declarations of which the first was that of St Petersburg, already described in its historical order[1], while in each of the others, all due to the Hague conferences, the powers parties to it describe themselves as "inspired by the sentiments which found their expression in the Declaration of St Petersburg." Coming from so deep a source, and not limited in their statement to land war, they apply to all war.

Declaration concerning the discharge of Projectiles and Explosives from Balloons.

The contracting powers agree to prohibit, for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature.

[1] Above, pp. 57, 58.

In this form, but without any limit of time, the declaration was suggested to the First Hague Conference in 1899 by the circular of Count Mouravieff, and in the same form but with a limit of five years was there adopted or was afterwards acceded to by 26 states. At the Conference of 1907, in the same form again but with the time limit given in it as above quoted, which was moved by the British delegate Sir Edward Fry, it was voted by 27 states and inserted in the Final Act with the consent of all attending; but of the eight great powers—Great Britain, the United States, Austria-Hungary, Japan, and the other powers of the Triple Alliance and the Triple Entente—only the three first named became bound by it. If, as is most probable, the great powers are on an equality in the command of the skill and material necessary for the employment of the means prohibited, the prohibition cannot be charged with partiality to any of them, while the civil population cannot be protected from danger if bombs may be dropped from the sky. Therefore in my judgment the prohibition ought to be made perpetual. But the Institute of International Law, at its Madrid meeting in 1911, resolved that "aerial war is permitted, but on the condition of not presenting greater dangers than land or sea war for the persons or properties of the peaceful population[1]." But who shall measure the proportion of the dangers? And the true question is not whether the danger is greater than those to which mankind has become accustomed, but whether it is not a new danger to which there is no reason that mankind should be exposed.

Declaration concerning Asphyxiating or Deleterious Gases.

The contracting powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.

This declaration has now been signed and ratified by all the powers represented at the Conference of 1899, except the United States of America, the objections of which were summed up by Captain Mahan in the words that "if and when a shell

[1] 24 *Annuaire*, p. 346.

emitting asphyxiating gases has been successfully produced, then and not before will men be able to vote intelligently on the subject." Not containing any limit of time it did not need to be brought forward again in 1907, but the powers which were represented only in 1907 have not yet acceded to it.

Declaration concerning Bullets with Hard Envelops.

The contracting parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelop which does not entirely cover the cone or is furnished with incisions.

This declaration also, which was introduced in 1899 and being unlimited in time needed no repetition in 1907, has now been signed and ratified by all the powers represented in 1899 except the United States, but not by those represented only in 1907. The expansive bullets against which it is directed are commonly called Dum-dum bullets, from the factory in India where they were first made, it having been found in the British frontier wars that the impact of an ordinary bullet did not give a shock sufficient to stop the onrush of certain assailants, so that the suffering caused to such assailants by their expansion in the body was not useless, and did not bring them within the principle of the condemnation of explosive bullets by the Declaration of St Petersburg. However that may be, the intention of using the Dum-dum bullets in ordinary war was always disclaimed by Great Britain, and they were not employed by her in the South African war.

ART. XXIII. *Besides the prohibitions provided by special conventions, it is especially prohibited:*

(a) To employ poison or poisoned arms;

(b) To kill or wound treacherously individuals belonging to the hostile nation or army;

(c) To kill or wound an enemy who, having laid down arms, or having no longer means of defence, has surrendered at discretion;

(d) To declare that no quarter will be given;

(e) To employ arms, projectiles, or material of a nature to cause superfluous injury;

(f) To make improper use of a flag of truce, the national flag, or military ensigns and the enemy's uniform, as well as the distinctive badges of the Geneva Convention;

(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

(h) [Added in 1907.] *To declare extinguished, suspended, or unenforceable in a court of law the rights and actions of the nationals of the adverse party.*

A belligerent is likewise forbidden to compel the nationals of the adverse party to take part in the operations of war directed against their country, even when they have been in his service before the commencement of the war.

ART. XXIV. *Ruses of war and the employment of methods necessary to obtain information about the enemy and the country are considered allowable.*

The special conventions referred to in the initial clause of H XXIII are those which have been discussed under H XXII, and any others which may have been or may be concluded whether generally or between particular powers. The prohibition in (*e*) expresses what are mentioned in the three Hague conventions as "the sentiments which found expression in the Declaration of St Petersburg." The prohibitions in (*a*) and (*b*), subject as to (*b*) to what will be said about treachery, and that in (*f*) of any improper use of a flag of truce, belong to the immemorial ones noticed above, p. 57. H XXIV is contrasted with H XXIII (*f*) in a manner which makes this an appropriate place for discussing the nature of the faith which is to be observed with an enemy.

The duty of truth is relative, as we may see from the familiar instance of a wayfarer who deceives a highwayman into the belief that help is at hand, that being conduct of which no sane moralist disapproves. When we seek to generalise the conditions on which the duty depends, it would be going much too far to say that we are released from it by every failure in duty towards us. Thus, in bargaining, the certainty that the

other party is trying to deceive us will not justify us in deceiving him. We must be exposed to the peril of serious damage, and that from a party whom or the cause which he maintains we regard as being in the wrong, and who has no reason to think that he is dealing with us otherwise than at arm's length. In the case of bargaining these conditions would be wanting. To break off the bargain might defeat an expectation of profit but, leaving us where we were, would not cause damage; and by continuing to bargain we continue normal relations with the party who has deceived us, and thereby prevent him from perceiving that he is dealing with us at arm's length. But war is an arm's length dealing from the first, and one in which the enemy is regarded as being in the wrong, while the damage to which we are exposed is incalculable. Therefore no duty is violated by ruses, even to the extent of spreading false reports; and even using the enemy's national flag, military ensigns and uniform, being in substance spreading a false report by acts instead of words, is allowed up to the last moment before fighting, when the true colours must be resumed. An attack or any employment of force can only be made under the external symbols of the proper nationality, or war would lose the characters on which such humanity as is possible in it depends; and the "improper use" of the enemy's symbols which is mentioned in H XXIII (*f*) must be understood in the sense of this established usage, and not more widely.

But conventions entered into for the conduct to be observed during war would be meaningless if war released the parties from the duty of observing them. Take for instance the convention which exists between Great Britain and France for the continuance of the postal service between them in the case of war, or the Geneva Convention, or indeed the Hague laws of war themselves. And when usage tacitly attaches a certain meaning to acts done during war, as the offer of truce or surrender is attached to hoisting the white flag, it has always been felt that there is a real convention which cannot be broken without bad faith. Another example of conventions arising from usage is that the word of a commander given to a commander, and intended to be acted on without time for enquiry, must be truthful. Thus even French writers, military

as Marbot and jurists as Pillet, severely condemn the false statement that an armistice had been concluded, by which Murat and Lannes obtained from the Prince of Auersperg the abandonment of the bridge of Spitz a few days before the battle of Austerlitz[1]. The same principles apply to certain cases concerning individuals. The giving and receiving quarter is a tacit convention or at least a convention the terms of which are not fully expressed, and if one who has yielded himself a prisoner should shoot his captor after he had passed on, or should shoot any other soldier of the enemy, he would be guilty of bad faith and would justly have forfeited his life.

When it is prohibited in H XXIII (*b*) to kill or wound individuals treacherously, cases such as those last mentioned are included, but the notion of treachery is wider than what without straining language can be described as breach of convention, and will certainly now cover acts which have not been always condemned. To appreciate it we must take account of the modern notion of war as the prosecution of a public quarrel *militari manu*, in which individuals are not to be affected except so far as the military proceedings, with their necessary adjuncts and consequences, may touch them[2]. It follows from this that killing individuals, outside the cases of fighting or military punishment to which they have made themselves liable, is killing persons who have had no reason to put themselves on their guard, and is therefore treacherous killing. Not only is it unlawful to employ murderers, but to set a price on the head of an individual, to offer a reward for bringing in an individual "dead or alive," or to outlaw him is unlawful as tending to murder and encouraging it[3].

H XXIII (*d*) denounces an ancient practice of declaring that no quarter will be given, especially used for terrifying

[1] Pillet, *Lois actuelles de la Guerre*, p. 94, quoting Marbot's *Mémoires*, t. 1, p. 240, and pointing out by numerous instances the defective ethics which allowed Greeks, Romans and Carthaginians to violate outrageously in spirit promises which they kept in the letter.

[2] See above, p. 36, for the complete disuse of the enemy character of individuals as the justification of any proceeding on the military, contrasted with the civil, side of war.

[3] So Lueder in 4 *Holtzendorff's Handbuch* 392, quoting Neumann and Bluntschli; the latter in *Le Droit International Codifié*, § 562.

besieged places into surrender, and, read in the spirit rather than in the letter, consecrates the modern practice of giving quarter whenever practicable. The admitted case in which it is not practicable is that which occurs during the continuance of fighting, when the achievement of victory would be hindered and even endangered by stopping to give quarter instead of cutting down the enemy and rushing on, not to mention that during the fighting it is often impracticable so to secure prisoners as to prevent their return to the combat. Hence it is especially difficult to avoid ruthless slaughter in the storm of a place or of a position, but the rule formerly dictated by military pride, that those are not entitled to quarter who insult a superior force by defending a place after a breach has been made and the counterscarp blown in, or who defend an ill fortified place at all against a superior force, is entirely obsolete and condemned[1]. Another case, rather asserted than admitted, is that which occurs "when from special circumstances it is impossible for a force to be encumbered with prisoners without danger to itself." On this I agree with Hall's remark that "prisoners who cannot safely be kept can be liberated," and, remembering that they are or may be disarmed, we can scarcely treat as more than theoretical the danger that they may be rescued and re-armed by a relieving force[2].

The missiles "of a nature to cause superfluous injury," prohibited by H XXIII (*e*), are understood to include glass, nails, and bits of iron of irregular shape. Many writers include red-hot shot in the prohibition, which may be admitted when they would be directed only against men, but their utility in causing the destruction of things cannot always be foregone, even when the fate of men may be involved with that of the things. Red-hot shot saved Gibraltar in the great siege by setting the Spanish rafts on fire.

[1] Hall is unable to find any instance of the indiscriminate slaughter of a garrison later than the massacre of the garrison and people of Ismail by the Russians in 1790, but quotes the Duke of Wellington (*Despatches, 2nd Series,* i. 93) as saying that "it has always been understood that the defenders of a fortress stormed have no right to quarter," although he never acted in conformity with that rule: § 129.

[2] See Hall, § 129.

H XXIII (*g*) refers to pillage as distinguished from requisitions, and to devastation not directly necessary for a military purpose, as to which see above, p. 58. Before quitting the Means of Injuring the Enemy, we must notice that it is considered unlawful to incite the enemy's troops to treason or desertion, a rule which was probably introduced for the mutual convenience of commanders and by a kind of chivalry between them, and which should carry with it the unlawfulness of enrolling deserters as recruits; also the allied rule that communications intended for the enemy can only be made to the highest officer in rank who is within reach. But it is not considered unlawful to stir up insurrection in the enemy's country. The projects of France in 1859 and of Prussia in 1866 to enrol Hungarian legions seem to lie on the very border between incitement to desertion and incitement to insurrection.

H XXIII (*h*), first paragraph. This paragraph seems so out of place in a code of land war, and has on that account been so much discussed in England, that some space must be given to its consideration. It was introduced at the Hague in 1907, where at the first meeting of the first sub-committee of the second committee, on 3 July, it was read by Major-General von Gründell, military delegate of Germany, among the five propositions of his delegation, in this form: *de déclarer éteintes, suspendues, ou non recevables les réclamations privées des ressortissants de la partie adverse.* The *procès-verbal* of the same meeting further runs thus: *M. Göppert, délégué-adjoint d'Allemagne, explique que cette proposition*[1] *tend à ne pas restreindre aux biens corporels l'inviolabilité de la propriété ennemie, et qu'elle vise tout le domaine des obligations en vue de prohiber toutes les mesures législatives qui, en temps de guerre, mettraient le sujet d'un état ennemi dans l'impossibilité de poursuivre l'exécution d'un contrat devant les tribunaux de*

[1] Sir F. A. Campbell, in his letter from the Foreign Office mentioned below, admits that by "this proposition" M. Göppert "in all probability must have referred to this particular amendment, though the *procès-verbal* does not render it at all clear." But whatever may be the defect in expression of the *procès-verbal*, which however in substance is practically clear enough, there can have been no doubt in the minds of those present about what the speaker meant.

la partie adverse. Thus the assembled powers were seized of the proposal to abolish the doctrine which denies to an enemy a *persona standi in judicio*, the power to appear in a court of law; and accordingly, at later meetings of the same sub-committee, the words *en justice* were inserted after *non recevables*, emphasizing the application of the new rule to regular courts and not merely to proceedings in connection with the occupation of enemy territory, if indeed any such proceedings can be suggested to which the rule would apply; a motion of the Russian delegate, General Zermolow, for allowing in certain cases the seizure of debts or documents belonging to the enemy which might assist in the continuance of the hostilities was not accepted; and the paragraph was reported to the second committee, which accepted it without discussion. On 17 August the report of that committee on its amendments to the Laws of War on Land was presented to the full conference, with the assurance that the essential parts of the work accomplished were not in the least modified, which was true in so far as the paragraph in question was not a modification but an addition. And the full conference, without availing itself of the opportunity of remark, sent the whole amended code to the drafting committee, of which Monsieur Renault was chairman, and he, not having time to draw up a written report, reported orally that "if they had occasionally modified the drafts sent to them, it was without affecting (*sans altérer*) the sense of the dispositions which they contained." In fact the final form of the paragraph differed from that which it had reached three months before only by the substitution of *les droits et actions* for *les réclamations privées*, and of *nationaux* for *ressortissants*, changes which, even if they were made at this stage, in no way affected the sense of the draft which M. Renault had received from the full conference.

In these circumstances it is not surprising that the paragraph has been unanimously understood as admitting enemies to a *persona standi in judicio* by the international lawyers of all countries except the two, Great Britain and the United States, which have hitherto been the most conservative on the question. Nor even in those two has there been much attempt to put any other construction on it. The United States General Davis,

who was a U.S.A. delegate at the Hague in 1907, seems to regard the paragraph as aimed only at abuses of the "administrative discretion" of a commander, providing against such a contingency as where he "refuses to receive well grounded complaints, or declines to receive demands for redress, in respect to the acts or conduct of the troops under his command, from persons subject to the jurisdiction of the enemy who find themselves for the time being in the territory which he holds in military occupation[1]." Professor Holland, while admitting as possible the case of the paragraph being "intended only for the guidance of an invading commander," says that "if, as would rather appear, it is of general application, besides being quite out of place where it stands, it is so revolutionary of the doctrine which denies to an enemy any *persona standi in judicio* that, although it is included in the ratification of the convention by the United States on 10 March, and the signature of the same on 29 June 1908, by Great Britain, it can hardly, till its policy has been seriously discussed, be treated as a rule of international law[2]." Dr Higgins says, "the meaning to be attributed to this clause is open to doubt[3]"; and Professor Oppenheim says that "the interpretation of article XXIII (*h*) is controversial[4]." But Sir F. A. Campbell, in a letter of 27 March 1911, written on behalf of Sir E. Grey, foreign secretary, goes so far as to say to Professor Oppenheim, who had laid before him the general foreign interpretation of Art. XXIII (*h*) and asked for the view of H.M.'s government on it—"it seems very strange that jurists of the standing of those from whose writings you quote could have attributed to the article in question the meaning and effect they have given it, if they had studied the general scheme of the instruments in which it finds a place[5]." To this rebuke M. Politis has replied that the articles 57–60 were placed in this very code at the Hague Conference of 1899 because no better place could be found for them, for want of time to add to the conventions

[1] *Elements of International Law*, 3rd edn., 1908, p. 578, n. 1.

[2] *Laws of War on Land*, 1908, at the same time bracketing H XXIII (*h*) as "apocryphal."

[3] *The Hague Peace Conferences*, p. 243.

[4] *International Law*, vol. 2, 2nd edn., p. 134.

[5] Ib.

of that conference, but were removed in 1907 to a convention to which they properly belonged; and that adding the German proposal in 1907 to H XXIII was a similar incident, which may have a similar conclusion at the third conference. In any case, he observes, *il est certain que la forme, si défectueuse soit-elle, ne saurait compromettre le fond des dispositions*[1].

My conclusions are these. It cannot be seriously questioned that the first paragraph of H XXIII (*h*) was adopted at the Hague, and has been signed as part of the relative convention, in the general understanding that it was directed against the whole denial to an enemy of a *persona standi in judicio*. It must therefore be so applied by the military commanders of the parties to the convention, if occasion should arise in land war for their so doing, which it is rather difficult to foresee. But there has not as yet been a vote or convention binding any country, in the judicial system of which an enemy has not the rights claimed for him in the paragraph, to confer them on him by legislation. When the question of such legislation may be mooted, Great Britain will be technically free to act as she may think best and most just, and her moral right to the same liberty will be best defended by a frank confession that, by an oversight, she did not in 1907 sufficiently appreciate the fact that a great juristic principle was brought forward by a soldier in a military branch of the conference. Lastly, it must be borne in mind that the denial to enemies of the *persona standi in judicio* is not the whole of the doctrine of non-intercourse. An enemy may be debarred from acquiring new rights, and yet his old rights may not, to use the language of H XXIII (*h*), be extinguished, suspended, or become unenforceable in a court of law. Therefore either negotiation or legislation on the subject will require very careful attention even from jurists.

H XXIII (*h*), second paragraph. This is the H XLIV of 1899, transferred here in 1907 with the excision of a limitation of its benefit to "the population of occupied territory," and with the mention of "the operations of war" substituted for that of "military operations." These changes will be further noticed in commenting on the new H XLIV, p. 101, below.

[1] 18 *Revue Générale de Droit International Public* 258, 259.

ART. XXV. *The attack or bombardment by any means whatever of towns, villages, habitations or buildings which are not defended is prohibited.*

The words "by any means whatever" were inserted in 1907, and ensure the permanent application to this case of the prohibition to employ projectiles dropped from the sky, whatever may at the next Hague Conference be the fate of the declaration against them.

It must not be forgotten that the Hague code deals only with war between civilised states, and therefore that this article cannot be quoted against the attack or bombardment of a town not having a government sufficient to be the proper object of hostilities. Such an operation may be an example of the punitive expeditions which are necessary as pointed out on p. 59.

Another limitation of the Hague code being to land war, the article now before us has no direct application even between civilised states to the bombardment of undefended coast towns from the sea; but since that is an operation not included in the ordinary scope of naval war, the present is a good occasion for considering the principle which underlies the article, with a view to seeing whether it may not throw light on a subject which has not been free from controversy. The principle of H XXV is that a land force can occupy an undefended place and, if it must afterwards evacuate it, can destroy before doing so all that its military value to the enemy exposes to lawful destruction; therefore bombarding the place without or before occupying it would be wantonly to endanger both the lives of the population and the property not lawfully subject to destruction. The same reason will apply to the dealings of a fleet with an undefended coast town, unless it cannot spare the force or the time required for landing and occupying it, including reembarkation if necessary: in that case only can the question of its right to bombard it arise. Now suppose that in such a case the town contains government stores or factories, or important government offices from which orders relating to the war are issued. These are things exposed to lawful destruction, and cannot claim to be spared because in the circumstances they can be destroyed only

by fire from the sea, but the enemy is bound to take care that he does no avoidable damage to life or to innocuous property. This is the justification of the bombardment of the large government stores at Odessa by the British during the Crimean War, and of the opinion which has been given by a large number of international lawyers of all countries that the government offices at the Hague, which is virtually a coast town, might be bombarded[1].

But suppose that the undefended coast town contains no such public invitations to attack as have been under our consideration, but that it abounds in private wealth. This, as at Liverpool, may be of such nature and amount that its destruction would be a serious, but by no means a decisive, blow to the resources of the country available for continuing the war; or, as at Brighton, its loss might fall only on the luxury of a certain number of individuals. In either case the destruction is not imperatively demanded, and therefore as an act of land war would be prohibited by H XXIII (*g*); and there can be no reason for passing a different judgment if the engine of destruction should be a fleet. And where actual bombardment would be unlawful, it must be equally unlawful to use a threat of it as a means of exacting a money ransom, whether called a contribution or by any other name.

ART. XXVI. *The commander of an attacking force before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities.*

B XVI was to a similar effect, only that "except in the case of surprise" stood in it where H XXVI, following Art. 33 of the *Manual* of the Institute of International Law, has "except in the case of an assault," and Lueder, notwithstanding the *Manual*, expressly allowed bombardment without notice as a means of hampering the defence by causing surprise and confusion[2]. It may be hoped that such harsh doctrine will not in future be met with.

[1] It was not the town of Alexandria, which is open, but the forts outside it erected or strengthened by Arabi Pasha, that were bombarded by the British fleet in 1882.

[2] 4 *Holtzendorff's Handbuch*, § 109.

ART. XXVII. *In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science or charity, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.*

The besieged ought to indicate these buildings or places by some particular and visible signs, which should previously be notified to the besiegers.

Thus firing on the houses of a fortified town is not forbidden, but when it can be avoided it is cruel, it is generally useless, and it ought to be forbidden unless there is reason to suspect that the houses are occupied by troops of the garrison or are used as magazines.

"Historic monuments" were added to the article in 1907 on the proposition of Greece.

ART. XXVIII. *The pillage of a town or place, even when taken by assault, is prohibited.*

In connection with the laws of war in the case of sieges it must be mentioned that the besieged cannot claim free exit for the useless mouths in the place, and that neutral diplomats in the place must submit to the restraints on their correspondence with their governments which military necessity may reasonably be thought to require[1]. It is even possible that some restraint might be imposed from military necessity on their right of quitting the place at critical moments.

Chapter II—On Spies.

ART. XXIX. *An individual can only be considered a spy if, acting clandestinely, or on false pretences, he obtains or seeks to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.*

Thus, soldiers not in disguise who have penetrated into the zone of operations of a hostile army to obtain information are not considered spies. Similarly, the following are not considered spies: soldiers or civilians, carrying out their mission openly, charged with the delivery of despatches destined either for their

[1] See my volume on *Peace*, 2nd edn., p. 265.

own army or for that of the enemy. To this class belong likewise individuals sent in balloons to deliver despatches, and generally to maintain communication between the various parts of an army or a territory.

"In the zone of operations of a belligerent" has been substituted for "in the localities occupied by a belligerent," which stood in B XIX, because an army in the field is entitled to protect itself from spying even in places only visited by its scouts. Where the danger to the spy is great enough for him to resort to clandestinity or false pretences, the danger to the army spied on must be great enough to justify the severity necessary for its protection.

The article leaves open the case of persons sent in balloons in order to gain information. In the war of 1870 the Germans claimed to treat these as spies, and actually imprisoned them in fortresses; but there is no justification for this, ballooning for information being free from clandestinity and false pretences, although it is a participation in the war, and therefore civilians as well as soldiers may be made prisoners of war for it.

At Brussels an article of the Russian draft, to the effect that "any inhabitant of the country occupied by the enemy who communicates information to the opposing force is likewise to be handed over to justice," was omitted in conformity with the unanimous opinion of the committee.

Guides are not spies. If they are captured and are soldiers they become prisoners of war. If they are civilians, an invading army might find it necessary to detain them; but subjects of the country who are caught guiding an invading army without being compelled to do so are liable to punishment for treason.

It needs only to be added that spying in war is not less honourable than fighting, and the punishment of it is to be regarded as having no other motive or justification than that of deterring others.

ART. XXX. *A spy taken in the act cannot be punished without previous trial.*

The trial will be by court martial, and, subject to the Hague code, by the military law of the capturing army. The punishment is death.

ART. XXXI. *A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.*

The offence of spying being thus cleared in the case of a soldier by its successful completion, there can be no reason for a different rule in the case of a civilian who is afterwards exposed to capture, but at Brussels there was a discussion on the point.

Chapter III—On Flags of Truce.

ART. XXXII. *An individual is considered as bearing a flag of truce who is authorised by one of the belligerents to enter into communication with the other, and who carries a white flag. He has a right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and the interpreter, who may accompany him.*

ART. XXXIII. *The chief to whom a flag of truce is sent is not obliged to receive it in all circumstances.*

He can take all steps necessary to prevent the envoy taking advantage of his mission to obtain information.

In case of abuse, he has the right to detain the envoy temporarily.

A permission to declare that flags of truce will not be received during a certain time was omitted at the Hague from B XLIV, the permission not to receive the flag of truce being regarded as sufficient.

ART. XXXIV. *The envoy loses his rights of inviolability if it is proved beyond doubt that he has taken advantage of his privileged position to provoke or commit an act of treachery.*

Chapter IV—On Capitulations.

ART. XXXV. *Capitulations agreed on between the contracting parties must be in accordance with the rules of military honour.*

When once settled, they must be scrupulously observed by both parties.

"A subordinate commander cannot without reference to superior authority grant terms under which the enemy gains any advantage more solid than permission to surrender with forms of honour"; and any political terms "cannot be consented to even by an officer commanding in chief without the possession of special powers." Capitulations therefore which transcend these limits require to be ratified by the commander-in-chief or the state of the officer granting them, and, if and when such ratification is received, the commander who accepted the terms is entitled to reconsider the situation and refuse the surrender. The article and these maxims apply equally to the capitulations of fortresses and of field forces, and no less to those of naval forces[1].

Chapter V—On Armistices.

ART. XXXVI. *An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not fixed, the belligerent parties can resume operations at any time, provided always the enemy is warned within the time agreed on by the terms of the armistice.*

ART. XXXVII. *An armistice may be general or local. The first suspends all military operations of the belligerent states; the second, only those between certain fractions of the belligerent armies and in a fixed radius.*

It seems superfluous to say that no general can conclude an armistice for forces not under his command, but even within that limit the superior commander or the authorities of the state may refuse to ratify an armistice. There is no difference between truces, suspensions of arms and armistices.

The principle which governs the suspension of military operations by an armistice is that nothing may be done by either party which the other party would have been in a position to hinder. It has been contended that the principle ought to be that during the armistice the state of things shall remain unchanged, which would give to a besieged fortress a right to be revictualled to the extent of the provisions consumed, but it

[1] See Hall, § 194, from which the quotations are made.

is certain that the besiegers will not allow such a right unless stipulated. See Hall, § 192.

ART. XXXVIII. *An armistice must be notified officially and in good time to the competent authorities and the troops. Hostilities are suspended immediately after the notification, or at a fixed date.*

ART. XXXIX. *It is for the contracting parties to settle, in the clauses of the armistice, what may be the relations on the theatre of war with and between the populations.*

This does not refer to the powers of contracting and suing as settled for each country by the view which its courts take of the legal doctrine of non-intercourse, or, in the case of countries occupied by an enemy, by the first paragraph of H XXIII (*h*), but to the intercourse in fact which the military authorities will permit.

ART. XL. *Any serious violation of the armistice by one of the parties gives the other party the right to denounce it, and even, in case of urgency, to recommence hostilities at once.*

ART. XLI. *A violation of the terms of the armistice by private individuals acting on their own initiative only confers the right of demanding the punishment of the offenders, and, if necessary, indemnity for the losses sustained.*

Section III—On Military Authority over Hostile Territory.

ART. XLII. *Territory is considered occupied when it is actually placed under the authority of the hostile army.*

The occupation applies only to the territories where such authority is established and can be exercised.

What an invader may do in the territory which he has invaded depends in part on whether his presence in the district in question, combined with his means of influence in that district, amounts to an occupation of it, for with regard to the territory which he occupies and its population he has special rights and duties. H XLII, which reproduces B I, lays down

the principle that occupation in the military sense must be real, a character which it shares with the occupation necessary to confer the ownership of a *res nullius*, although these two senses of the word are distinct and there can be no reasoning from one to the other. It will be a great mitigation of the sufferings of invaded countries if this principle should finally prevail over the practice of presumptive occupation, which Hall sums up as follows from the wars of Napoleon and that of 1870. According to the view embodied in that practice, he says, occupation "is complete throughout the whole of a district forming an administrative unit so soon as notice of it has been given by placard or otherwise at any spot within the district, unless military resistance on the part of duly organised national troops still continues. When occupation is once established it does not cease by the absence of the invading force, so that flying columns on simply passing through a place can render the inhabitants liable to penalties for disobedience to orders issued subsequently when no means of enforcing them exists, or for resistance offered at any later time to bodies of men in themselves insufficient to subdue such resistance. Although also occupation comes to an end if the invader is expelled by the regular army of the country, it is not extinguished by a temporary dispossession effected by a popular movement, even if the national government has been reinstated." And he adds that "the administrative unit adopted by the Germans in 1870, as that the whole of which was affected by notice of occupation given at any spot within it, was the French canton," of which "the average size is about 72 square miles." Excessive however as are such claims, it must be admitted that difficulty will sometimes arise in deciding on the reality of occupation on the flanks or in the rear of an invading army. In trying to express more precisely the spirit of B I or H XLII we can scarcely do better than again quote Hall, who says that the just requirements of an invader "might probably be satisfied, and at the same time sufficient freedom of action might be secured to the invaded nation, by considering that a territory is occupied as soon as local resistance to the actual presence of an enemy has ceased, and continues to be occupied so long as the enemy's army is on the spot; or so long as it covers it, unless the operations of the national or an allied

army, or local insurrection, have re-established the public exercise of the legitimate sovereign authority[1]."

ART. XLIII. *The authority of legal power having passed* de facto *into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.*

The word "safety," used in the official English translation, does not adequately render the *vie publique* of the original, which describes the social and commercial life of the country.

Down to the middle of the eighteenth century the authority of an invader was not distinguished from conquest. The doctrine had not been established that the sovereignty over a territory and its population is not transferred till the end of a war, when it may pass by cession in the treaty of peace, or by conquest if all contest ceases and the war comes to an end without such a treaty, as happens when one of the belligerent states is extinguished. The documents drawn up by local authorities in the ordinary course of administration were expressed in the name of one prince or another, as the tide of invasion and recovery swayed to and fro over the locality[2]. Frederick the Great taught that the business of an invader in winter quarters was to raise recruits from the country by compulsion, and that was his practice as well as that of other commanders in the war of the Austrian Succession and in the Seven Years war[3]. But now that the

[1] These quotations are from § 161.

[2] See this illustrated in detail by Lameire, *Théorie et pratique de la conquête dans l'ancien droit*, 1902; *Les occupations militaires en Italie, guerres de Louis XIV*, 1903; *Espagne, guerres de l'ancien droit*, 1905; *Ile de Minorque*, 1908; *Italie, guerres du XVIII^e siècle*, 1911.

[3] "It was sometimes necessary to stipulate on the conclusion of peace for the restitution of men taken in this manner. See for example Art. 8 of the peace of Hubertsburg, *De Martens, Rec.* i. 140." Hall, § 154. The modern doctrine appears in Vattel, liv. 3, § 197, in a hesitating form, since he says that the acquisition by the invader is not complete, his property does not become stable and perfect, but by the treaty of peace or the extinction of the invaded state. It appears fully in the decision of Lord Stowell that the inhabitants of a part of a friendly country (Spain) which the common enemy has occupied are not enemies as owners of ships;

distinction between conquest and military occupation is firmly drawn, the source of an invader's authority cannot be looked for in a transfer of that of the territorial sovereign. It is a new authority, based on the necessities of war and on the duty which the invader owes to the population of the occupied districts. In B II this was intimated by saying "the authority of legal power *being suspended* and having passed *de facto* into the hands of the occupant." And in H XLIII the suspension, not the transfer, of the power previously legal must equally be understood; what it is intended to express as having passed to the occupant is the fact of having legal authority, not the preexisting authority with its nature and limits.

H XLIII indicates that the law to be enforced by the occupant consists of, first, the territorial law in general, as that which stands to the public order and social and commercial life of the district in a relation of mutual adaptation, so that any needless displacement of it would defeat the object which the invader is enjoined to have in view, and secondly, such variations of the territorial law as may be required by real necessity and are not expressly prohibited by any of the further rules which will come before us. Such variations will naturally be greatest in what concerns the relation of the communities and individuals within the district to the invading army and its followers, it being necessary for the protection of the latter, and for the unhindered prosecution of the war by them, that acts committed to their detriment shall not only lose what justification the territorial law might give them as committed against enemies, but shall be repressed more severely than the territorial law would repress acts committed against fellow subjects. Indeed the entire relation between the invaders and the invaded, so far as it may fall within the criminal department whether by the intrinsic nature of the acts done or in consequence of the regulations made by the invaders, may be considered as taken out of the territorial law and referred to what is called martial

The Santa Anna, Edwards 180; and in the official French *Manuel de droit international pour les officiers de l'armée de terre,* which says, p. 93, that "*l'occupation est simplement un état de fait qui produit les conséquences d'un cas de force majeure; l'occupant n'est pas substitué en droit au gouvernement légal.*"

law. The committee of the Brussels Conference which drew up B III, substantially equivalent to the latter part of H XLIII, explained it as meaning that political and administrative laws should be subject to suspension, modification or replacement in case of necessity, but that civil and penal laws should not be touched. In this they had in view the penal laws relating to offences committed by one member of the population against another, they certainly did not intend that the territorial penal law should not be modified or extended by martial law. On the other hand the right of an occupant as to political laws should perhaps have been more guardedly stated. It will often be necessary to suspend them, but not to modify or replace them. The political rights of an occupied population are indestructible as long as its national character is not affected, and so in 1871 the inhabitants of Alsace-Lorraine were allowed by the Germans to take part in the election of the French national assembly their cession by which was already a foregone conclusion[1].

To the extent to which the legal power of the occupant is admitted he can make law for the duration of his occupation. Like any other legislator he is morally subject to the duty of giving sufficient notice of his enactments or regulations, not indeed so as to be debarred from carrying out his will without notice, when required by military necessity and so far as practically carrying out his will can be distinguished from punishment, but always remembering that to punish for breach of a regulation a person who was justifiably ignorant of it would be outrageous. But the law made by the occupant within his admitted power, whether morally justifiable or not, will bind any member of the occupied population as against any other member of it, and will bind as between them all and their national government, so far as it produces an effect

[1] The following, taken from the *considérants* of a French court, is a better general statement than that of the Brussels committee. "*Il est de principe que l'occupation du territoire par l'ennemi n'entraîne pas la suspension du droit politique ou privé du pays occupé; que les lois civiles et pénales conservent au contraire tout leur empire, à moins qu'elles n'aient été l'objet d'abrogations expresses et spéciales commandées par les exigences de la guerre. Telle est l'opinion des auteurs les plus accrédités qui ont écrit sur le droit international.*" Nancy, 27 August 1872; Dalloz, 1872, II. p. 185; 1 Clunet 126.

during the occupation. When the occupation comes to an end and the authority of the national government is restored, either by the progress of operations during the war or by the conclusion of a peace, no redress can be had for what has been actually carried out but nothing further can follow from the occupant's legislation. A prisoner detained under it must be released, and no civil right conferred by it can be further enforced. The enemy's law depends on him for enforcement as well as for enactment. The invaded state is not subject to the indignity of being obliged to execute his commands[1]. This however, if the occupation has been prolonged, may be subject to an exception which will be best understood from an example. The French island of Guadeloupe in the West Indies was occupied by the British in 1810, and was restored to France only by the treaty of Stockholm in 1814, Great Britain having ceded her rights in it to Sweden in 1813. The French court decided that certain benevolent institutions (*bureaux de bienfaisance*), founded by the inhabitants with the aid of the British Government, retained the character of public establishments. "Progress," the court said, "being the supreme law of societies, a conqueror who is *de facto* sovereign fills the place of the legitimate sovereign, and is bound to satisfy in his stead the needs of the country which he occupies; and the measures which he takes with that view have the same force and stability as if they had been taken by the legitimate authority itself....The inhabitants, in order to found benevolent institutions with the aid of public authority, were not bound to wait indefinitely for the chances of war or a peace to replace them under their legitimate government[2]."

It remains to explain more fully the martial law which has been spoken of as governing the relations between the invaders

[1] The cases decided in the United States as to the effect after the conclusion of peace of measures taken during the war by their officers, at places which they acquired by the peace, do not touch what is here said. Naturally such measures would continue to produce their effect until the acquiring sovereignty made other regulations for the places in question. See *Cross v. Harrison*, 1853, 16 How. 164, Scott 658.

[2] *Beauvarlet c. Bureau de bienfaisance de la Pointe-à-Pitre*, Guadeloupe, 31 August 1869, confirmed by *Cassation Req.* 6 January 1873; Dalloz, 1873, I. p. 115; 1 Clunet 243.

and the invaded, and so entering as an element into the law administered by an occupant. It must be distinguished both in its purpose and in its rules from the martial law or "state of siege" to which governments often have recourse in times of internal disturbance: the internal measures which pass under that name can be discussed only in connection with the constitutional laws of the respective countries in which they are taken. It must also be distinguished from the military laws issued by governments for the discipline and conduct of their armies. So far as these deal with the conduct of the respective armies towards the populations of the countries invaded by them, they cover the same ground as the martial law of international jurists and ought to be in accordance with whatever has been agreed on as internationally binding, but, being the regulations of particular states, they have no international force. The martial law of international jurists consists of the regulations which by convention or approved custom are agreed on as internationally binding for the relations between invaders and invaded, and, as such, is not peculiar to the cases in which invasion has ripened into occupation. It comes into play from the first moment of an invasion, but during an occupation its rules are increased in stringency in proportion to the greater security which the invader claims to enjoy in the midst of a population which he benefits by maintaining social order among them. Its courts of justice are courts martial, to be held with as great security for full enquiry and fair dealing as circumstances permit, but so that drumhead courts martial are not necessarily excluded. Its code is draconic, and in the case of occupation is thus described by Hall. "All acts of disobedience or hostility are regarded as punishable, and by specific rules the penalty of death is incurred by persons giving information to the enemy or serving as guides to the troops of their own country, by those who while serving as guides to the troops of the invader intentionally mislead them, and by those who destroy telegraphs, roads, canals or bridges, or who set fire to stores or soldiers' quarters. If the inhabitants of the occupied territory rise in insurrection, whether in small bodies or *en masse*, they cannot claim combatant privileges until they have displaced the occupation, and all persons found with

arms in their hands can in strict law be killed, or if captured be executed by sentence of court martial. Sometimes the inhabitants of towns or districts in which acts of the foregoing nature have been done, or where they are supposed to have originated, are rendered collectively responsible and are punished by fines or by their houses being burned[1]." Even so humane a writer as Hall felt himself unable to rule out any of these claims as never being admissible, although he observes that "in very many cases, probably indeed in the larger number, the severity of the measures adopted by an occupying army is entirely disproportioned to the danger or the inconvenience of the acts which it is intended to prevent; and when others than the perpetrators are punished, the outrage which is done to every feeling of justice and humanity can only be forgiven where military necessity is not a mere phrase of convenience but an imperative reality[2]."

Probably however the above list of lawful severities is capable of some revision. That the inhabitant of an occupied district should incur death for giving information to the enemy, or for serving as a guide to the troops of his own country, is a relic of the time when occupation meant conquest, transferring the allegiance of the occupied population. There is no other foundation for the epithet of "war-treason" (*kreigsverrath*) which German writers apply to every act of a member of that population directed against the occupying army, for the duty owed in return for the maintenance of order will not extend so far. No act of that kind can be regarded as treasonable without violating the modern view of the nature of military occupation, and to introduce the notion of moral fault into an invader's view of what is detrimental to him serves only to inflame his passions, and to make it less likely that he will observe the true limit of necessity in his repression of what is detrimental to him. And in the cases of giving information and serving as guide to one's own people, the attempt at sanguinary repression would have the additional demerit of inutility, since it could not succeed except among a people more abject than it would be possible to discover[3]. And

[1] § 156. [2] Ib.

[3] The question of "war-treason" is well discussed by Pillet, *Le Droit*

when the inhabitants of an occupied district rise in insurrection, and satisfy the conditions of loyal fighting laid down by H I, it is difficult to refuse the privileges of combatants to a body of them operating on a scale which may fairly be considered as war. If they are to have those privileges when "they have displaced the occupation," they cannot reasonably be refused them when taking the necessary means of displacing it; and that H I applies in occupied territory may be inferred from the restriction of H II to unoccupied territory.

ART. XLIV. *Any compulsion of the population of occupied territory to furnish information about the army of the other belligerent or about his means of defence is prohibited.*

We have seen, p. 86 above, that what is now the second paragraph of H XXIII (*h*) stood here, with a limitation of its benefit to the population of occupied territory. The object of the article so framed was to condemn the forced enrolments which, as has been mentioned, used to be made in occupied territory as a consequence of the transfer of sovereignty formerly considered to have taken place. The change was made because the condemnation was felt to be based on a principle of humanity applying to all services which it might be desired to exact from enemy subjects, and this as well before as after occupation has been established. The article however which we now have in this place deals specially with part of the services formerly exacted, ominously avoiding express mention of the service of guidance, while on the other hand that service is brought more clearly than before under the expression of the principle in its new place by substituting the term "operations of war" for that of "military operations." Indeed the statement of this portion of the laws of war has been marked by peculiar inconsistency and vacillation. It was the universal practice to exact the services of guides. Uneasiness was displayed about it at Brussels in 1874 and the Hague in 1899. Then the German

de la Guerre, 2me partie, pp. 239, 240. Of giving information and serving as guide to one's own people, he says: *nous ne prétendons pas que ces faits ne puissent être punis dans l'intérêt de la discipline, mais nous soutenons qu'il est injuste et barbare de leur appliquer les peines de la trahison.*

General Staff, while echoing the sentiment of its inhumanity, treated it in its work of 1902 as indispensable[1], and the Japanese followed the practice in their war against China. Now Germany, Austria, Japan, Montenegro and Russia have withheld their ratification from the new H XLIV, as though, after all the pains taken with it, the code still condemned the practice, as I venture to think that it does.

If the inhabitants act voluntarily as guides to the enemy, they of course render themselves liable to the penalties of treason from their own government when restored in the locality; and the invader ought therefore to furnish requisitions in writing to the guides whom he decides to employ.

ART. XLV. *Any compulsion of the population of occupied territory to swear allegiance to the hostile power is prohibited.*

Here we have the express condemnation of another of the practices which resulted from the old theory of occupation. The principle extends to prohibit every thing which would assert or imply a change made by the invader in the legitimate sovereignty. His duty is neither to innovate in the political life of the occupied districts nor needlessly to break the continuity of their legal life. Hence, so far as the courts of justice are allowed to continue administering the territorial law, they must be allowed to give their sentences in the name of the legitimate sovereign. With the modifications of the territorial law which the invader may introduce, they have nothing to do: those belong to his martial law, and he must enforce them. But if during the occupation the form of the national government should be changed by a revolution in the part of the territory which remains free from invasion, it is no part of the invader's duty to allow that change to take effect in the occupied districts. What their future political life will be must depend on the result of the war, and a political change

[1] *Les lois de la guerre continentale* (*publication de la section historique du grand état-major allemand,* 1902), *traduites et annotées par* Paul Carpentier, p. 110. The Manchurians were not enemies of the Japanese in their war with Russia. For the practice of the Japanese in their Chinese war see *La Guerre Sino-Japonaise au point de vue du Droit International,* by Nagao Ariga, p. 160.

which may affect that result cannot be indifferent to the invader. Thus the Germans in 1870 were within their right when, after the fall of the French empire, they refused to allow the courts of the occupied departments to give their sentences in the name of the republic.

ART. XLVI. *The honour and rights of the family, the lives of individuals and private property, as well as religious convictions and public worship, must be respected.*

Private property cannot be confiscated.

This article applies both to the regulations which the invader may make by his prerogative of martial law and to the behaviour of his troops. By the prohibition of confiscation it is only meant that private property cannot by any regulation of the invader be taken from its owner for no other reason than that he is an enemy, not that it cannot be taken for military necessity or by way of punishment for disobedience to a regulation or a requisition. Speaking of the punishment which an enemy may inflict for such causes a learned writer has said that it ought to be in proportion to the importance of the cause, and never to be inspired by the spirit of vengeance, intimidation or cruelty[1]. We however would rather say that, whatever may be thought of the right of a legitimate sovereign to inflict punishment as an expression of the vengeance of the community against outraged morality, an enemy occupant cannot justify punishment except for the purpose of intimidation, that is, to prevent others from doing the like. But the caution against cruelty and in favour of proportion is just.

For the rest, it is only movable property that an enemy as occupant can possibly confiscate. Immovable property (land) must necessarily remain subject to the laws of the sovereign who is restored or introduced at the peace.

ART. XLVII. *Pillage is formally prohibited.*

Pillage, as an untechnical term, means indiscriminate plundering, such as under the old rule of *courir sus* was habitually

[1] Bonfils, *Manuel de Droit International Public*, 4th edn., by Fauchille, p. 647.

practised against the enemy. As a term of modern law it may be defined as the unauthorised taking away of property, public or private, so that in order to appreciate the prohibition contained in this article we must know what taking away is authorised. With regard to public property we shall find in H LVI the line of demarcation between what may and may not be appropriated by an invader. Private property may only be appropriated by way of requisition, in pursuance of an order made by the occupant for a contribution, or when it consists of arms or munitions of war, which even though not being used are always seizable, subject to what is said about them when private properties in H LIII, and to the recognition in H IV that the arms, horses and military papers belonging to prisoners are seizable. And it will be pillage if even what may be taken is taken in a way not authorised by the military authority, or if the individual captor appropriates to himself what by the regulations of his state or army he ought to give account of.

The abolition of the old indiscriminate plundering is one of the greatest advances towards humanity that have been realised in the practice of war. Hall well points out that it was made "partly for the selfish advantage of belligerents, who saw that the efficiency of their soldiers was diminished by the looseness of discipline inseparable from marauding habits, and who found when war became systematic that their own operations were embarrassed in countries of which the resources were destroyed[1]." He also shows that one of the most important steps towards it was made by Gustavus Adolphus. "It would seem," he says, "that as a general rule pillage was only permitted in the Swedish army after a battle or the capture of a town; the Swedish soldiers however were at that time far better organised and disciplined than those of any other country, and the habits of the Imperialists were very different[1]."

ART. XLVIII. *If in the territory occupied the occupant collects the taxes, dues and tolls imposed for the benefit of the state, he shall do so as far as possible in accordance with the rules in existence and the assessment in force, and will in consequence be bound to defray the expenses of the administration of the occupied*

[1] § 139.

territory on the same scale as that to which the legitimate government was bound—(sic, but as there would seldom be a law binding the legitimate government to any scale of expense, the scale existing at the date of the invasion would probably be understood as meant).

The wording of this article was slightly altered from that of B V in order not to seem to give the occupant a right to collect the taxes. But although framed hypothetically H XLVIII, by its separate mention of the taxes and of the consequence attached to their collection, still distinguishes between money exacted by the occupant under that name and the contributions of which we shall presently read. The origin of the distinction, which is generally maintained by writers on international law, no doubt lay in the old theory of occupation being conquest, so that the occupant, as the new sovereign, was entitled to the taxes due by the laws which he found established. This ground will not hold now, nor is there any other solid legal ground. If the proceeds of the taxes are already in a public treasury seized by the occupant, he takes them just as he takes the balance of the money in the treasury. If they are not, and he is not a new sovereign, will his physical power over the persons of the debtors entitle him to exact the payment to him of sums due to his enemy state, and to give them a discharge valid as against that state? There does not seem to be any juridical reason for so holding, and, if there were, the doctrine would be applicable to other debts due to the legitimate sovereign as well as to the taxes. But it is certainly equitable that if the usual administration is carried on it should be paid for by the usual taxes, and that the legitimate sovereign, on recovering his power over the district, should hold the inhabitants discharged by what they have paid to the occupant as such taxes.

ART. XLIX. *If besides the taxes mentioned in the preceding article the occupant levies other money contributions in the occupied territory, this can only be for military necessities or the administration of such territory.*

B XLI ran that "the enemy in levying contributions, whether as equivalents for taxes or for payments which should be made in kind or as fines, will proceed as far as possible

according to the rules" etc. (see H LI). The "payments which should be made in kind" are those which H XLIX contemplates as being levied for military necessities, and that H XLIX was not intended to prohibit fines is shown by H L regulating them. B XLI is not therefore at variance with H XLIX in respect of the objects for which it contemplates the levy of money contributions, but the later article marks a step in advance in expressly limiting them to those objects. The invader must not exact them in order further to eke out the cost of the war.

ART. L. *No collective penalty, pecuniary or other, can be inflicted on a population on account of the acts of individuals for which it cannot be regarded as collectively responsible.*

This provision, which was not contained in the Brussels code, completes H XLIX by showing that no extraordinary contributions or requisitions can be excepted from it unless they are penalties in the strict sense, imposed by the occupant with the purpose of repression, in retribution for acts done, and limited in their incidence by the responsibility for those acts which can be justly imputed. For example, no penalty, whether in money or in services, can be imposed on a district which it is claimed has been constructively occupied by virtue of a notice posted at some point of it, if such notice could not come to the knowledge of the district as a whole before the act which it is desired to punish was committed. Nor can a penalty be imposed on a district more extensive than can justly be supposed to share the responsibility for the act which it is desired to punish.

It must be observed that H XLIX and H L have nothing to do with a payment in the nature of ransom, which an invader may make the condition of sparing to a place not yet occupied the mischief that would result from a lawful operation of war.

ART. LI. *No contribution shall be collected except under a written order and on the responsibility of the commander-in-chief.*

The levy shall only take place, as far as possible, in accordance

with the rules in existence and the assessment in force for taxes.

For every contribution a receipt shall be given to the payer.

B XLI allowed contributions to be levied also by the civil authority established by the occupant.

ART. LII. *Neither requisitions in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the district, and of such a nature as not to imply for the population the obligation to take part in the operations of the war against their country.*

These requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

What is furnished in kind shall as far as possible be paid for in ready money; if not, the fact of furnishing shall be recorded by receipts, and the sums due shall be paid as soon as possible [the last clause added in 1907].

The money, things and services which invaders take from the inhabitants of the enemy territory are now classified as contributions when they are money, requisitions when they are things or services, though formerly that distinction of terms was not strictly observed. Contributions have been dealt with in the articles H XLVIII to H LI, and the code now proceeds to deal with requisitions. Since military necessities (H XLIX) or, which is the same thing, the necessities of the army of occupation (H LII), are referred to in giving the measure of both, there is a connection between them, and as we have reached a point at which both have been brought before us some general observations may now be made on the connected matters. The first such observation is that the character of the laws of war, as being always restrictive and never giving a positive sanction to violence[1], is plainly indicated in the articles in question. No right to levy contributions or make requisitions is declared, but H XLVIII and H XLIX are hypothetical on the payment of the money being imposed, and H L, H LI and H LII are expressly provisions of restraint.

If we ask what at different times it has not been prohibited

[1] See above, p. 56.

to take from the inhabitants of the enemy territory, the answer for the oldest time is that nothing was prohibited to be taken from them. Neither in antiquity nor under the doctrine of *courir sus* had the inhabitants of the enemy territory any rights against the invader. He took without scruple whatever the pillage by his troops had left, so far as he desired to take it. But when the view prevailed that occupation was conquest, as soon as his inroad became an occupation he was placed in a new relation to the inhabitants of the occupied territory. They would no longer be properly regarded as his enemies but as his subjects, and the worst government that ever existed with the pretension of being civilised never dreamed of leaving the property, money and persons of its subjects, not chargeable with active opposition to it, to the arbitrary will of its military commanders. The question then for the invading sovereign should have been how much of the burden of the war, as between his old subjects and his new, he could justly throw on the latter. But there is no trace that that question was ever put. With a thoughtless want of logic the burden of war which it was customary for the people of occupied districts to bear as enemies was still imposed on them as subjects; they only acquired a better title than the occupant's mercy to keep what was left to them after all requisitions and contributions were satisfied. Afterwards military occupation came to be distinguished from conquest, and about the same time Rousseau proclaimed that war is a relation of state to state, in which citizens who are neither soldiers nor defenders of their country are not implicated[1]. But again the passive citizen was not allowed to profit by the new doctrine, though this time there was not a thoughtless want of logic. The requisitions and contributions were still exacted from him though he was neither a soldier nor a defender of his country, and pens were, and are still, employed to reconcile his fate with the proclamation of Rousseau. Lastly there has come the modern doctrine that between the passive citizen and the enemy state war introduces a relation by virtue of which the former may be made to suffer what for the purpose of the war it is "necessary" or "natural" for the latter to inflict[2]. Combine with this the fact that most

[1] See above, p. 40.

[2] See above, pp. 36, 37.

nations do not consider themselves rich enough to conduct a campaign on enemy's territory without availing themselves of the resources of that territory, and the exaction of requisitions and contributions is justified in the measure in which the invader's own resources are deemed by him to be insufficient. In sum, requisitions and contributions have continued to be exacted, by force of tradition and circumstance, through a series of successive theoretical views none of which has been capable of fixing a limit to them.

When the Duke of Wellington carried the Peninsular War from Spain into France his army paid for what it took, and found its reward in the abundance of supplies offered to it. But this was a procedure of which history furnishes few examples. The Prussians paid their way in the kingdom of Saxony in 1866, it being their desire to preserve the friendship of the Saxon population as a portion of the intended North German confederation. And in 1871 Germany repaid, out of the war indemnity received from France, the exactions which she had imposed on the territory ceded to her. But it results from the historical sketch which we have given that no obligation on the part of an invader to pay the amounts represented by the receipts which he gives for requisitions and contributions is acknowledged by public opinion and practice, that is, by what is called public law. It is sometimes suggested—for it can scarcely be put more strongly—that, if the invader does not pay those amounts, an ultimate liability for them rests on the territorial government[1]. But since that government does not regard itself as having provoked the war by wrongful conduct, it will not acknowledge itself to be more responsible for the calamities which its subjects have suffered by the invasion than for those which they may

[1] The German general staff says in the work above quoted that "in order to secure to the owners of these things [private property taken] an indemnity from their own government, equity commands the delivery to them of receipts for the requisitions carried into effect." Carpentier's translation, p. 131. The French court of cassation has held that charges imposed on an occupied place, but not of acts of pillage or of violence, must be made good to individuals by the commune: Dalloz, *Supplément*, t. 15 (1895), p. 459, quoted by Nys, 8 *Revue de Droit International et de Législation comparée*, 2e *série*, p. 447. See the same article by Nys, for opinions on the duty of a government.

suffer from tempest or earthquake, and it has not been usual for it to assume such responsibility. It was a novel instance of generosity when, in 1871, the French legislature, expressly repudiating liability, voted a large sum of money, but not equal to the amount of the German exactions, for the relief of those who had suffered from them. In short, as between the invading government and the individuals from whom it takes requisitions and contributions, all question about them is concluded by the taking them; as between the invading and the territorial governments, the latter as representing the grievances of its subjects, it is concluded by the peace; and as between the mass of the nation represented by the territorial government and the suffering individuals, no juridical question arises, there arises only the political claim that losses incurred for a cause in which the whole people were embarked together should be borne with some approach to equality. In these circumstances the Hague laws of war adopt a line which does not commit them to any conclusion. By saying that requisitions should be paid for in ready money as far as possible, they must mean that this shall be done by the invading army, since it is with its conduct that the whole of Section III is concerned: but they leave it open to the invading government to plead that it is not rich enough to invade a neighbour at its own cost. And so far as the requisitions are not paid for in ready money, it is not demanded that the receipts to be given shall express a liability, but only that they shall record the fact of the requisitions having been furnished—*les prestations en nature seront constatées par des reçus*—leaving the person who gets the record to make such use of it as he can.

Coming now to the limits which the best modern opinion seeks to place on the exactions of an invader, we observe that H LII restricts requisitions to "the necessities of the army of occupation," which in conformity with present understanding are described by Hall as consisting "of articles needed by the army for consumption or temporary use, such as food for men and animals and clothes, wagons, horses, railway material, boats and other means of transport, and of the compulsory labour, whether gratuitous or otherwise, of workmen to make roads, to drive carts, and for such other services." The German general

staff describes digging ditches, and work on streets, bridges, railways and buildings as lawful objects of compulsory labour. Indeed, even in times when the civil population was treated with less humanity than now, the practical difficulty of carrying articles requisitioned in kind out of the country generally limited demands of that class to the consumption or immediate use of the army[1]. The restriction which places modern opinion in the sharpest contrast to what was common as late as the early part of the nineteenth century is that by which H XLIX, as we have seen, limits contributions, so far as not expended on the administration of the occupied territory, to an equivalent for requisitions. Where the things or services which an army wants in kind for its use are to be found or obtained in the territory, it may be better both for itself and for the population that it shall levy the amount of their price and buy them or pay for them than that it should take them without payment from their owners or from those who can render them. The burden is then more equally distributed, and the things and services themselves may be more easily obtained in the requisite quantities. It was not intended by H XLIX to permit the levy of money to be spent in the invader's own country in supplying the necessities of his army. The provision made at home must be borne by him out of his general resources, except so far as he may be able to recover its cost from the enemy as a war indemnity at the peace. The exactions which he makes as an occupant are not to be the means, as they were often made to be, of increasing his general ability to carry on the war. The line thus drawn, it is true, is not to be deduced from the principle that the passive citizen may be made to suffer only what it is "necessary" or "natural" for the enemy of his state to do in order to break down the resistance of his state, even when it is

[1] Not always. Under the decrees of the *Comité de Salut Public* and the instructions of the "representatives of the people" who accompanied the French revolutionary armies, whatever was thought likely to be of future use was to be sent to the rear, and an instance is mentioned in which wines, taken from the persons who for their real or presumed political opinions were classed as enemies of the republic, were ordered to be sold on the spot. Basdevant, *La révolution française et le droit de la guerre continentale*, pp. 140, 144, quoted by Nys, 8 *Revue de Droit International et de Législation comparée*, 2^e^ *série*, p. 307.

guarded by the qualification, necessary or natural in the course of military operations. But it is a practical alleviation of the application of that principle, and it can only be made a tangible line by insisting, first, on the limitation of requisitions to the consumption or immediate use of the occupying army, and secondly, on a limitation of contributions which makes them a substitute for requisitions so limited.

H LII further lays down that requisitions, and by consequence the contributions which may be substituted for them, even when imposed for the necessities of the army of occupation, shall not be in cruel disproportion to the resources of the district, and that no services shall be required which would amount to *taking part in* the operations of the war. The last clause is worded similarly to the second paragraph of H XXIII (*h*) (above, p. 79), and less strictly than that (H VI; above, p. 67) which provides that the tasks of prisoners shall *have nothing to do with* the operations of the war (*n'auront aucun rapport avec*). Work on roads, bridges and railways, which has very much to do with the military operations, is constantly requisitioned. Even service as a guide is allowed to be requisitioned by those who do not see or will not accept its falling under H XXIII (*h*), second paragraph, although that case is a particularly cruel one. But there must be a limit, and I suppose that to require an enemy civilian to assist in placing a gun in position would be recognised by all as forbidden by H LII.

Among or analogous to the services which may be requisitioned from the population of an occupied district is that of serving as hostages, "to ensure prompt payment of contributions or compliance with requisitions," "as a guarantee against insurrection," or "as a protection against special dangers which it is supposed cannot otherwise be met." In 1870 the Germans placed on the railway engines notable inhabitants of districts in which the lines had been frequently damaged, a proceeding which "was universally and justly reprobated on the ground that it violated the principle which denies to a belligerent any further power than that of keeping his hostage in confinement." And it may be also condemned as inflicting, if any harm happened to the hostage, an individual penalty for facts with which he was not individually connected. It would not be more unjust if

civilians of the enemy state were placed in the front of battle in order to induce the enemy's troops to withhold their fire. Where the seizure of hostages is lawful, "under a usage which has long become obligatory it is forbidden to take their lives, except during an attempt to escape, and they must be treated in all respects as prisoners of war[1]."

ART. LIII. *An army of occupation can only seize cash, funds and realisable securities belonging strictly to the state, but can seize depôts of arms, means of transport, stores, supplies, and generally all movable property of the state of a nature to be used in the operations of the war.*

All appliances, whether on land, at sea or in the air, adapted for the transmission of news or for the transport of persons or goods, apart from cases governed by maritime law, depôts of arms and generally all kinds of munitions of war, may be seized even though belonging to private persons; but they must be restored and the indemnities for them regulated at the peace.

The opening provision of H LIII is so worded as to exempt from seizure both, first, cash, funds and realisable securities of which the state is only custodian, such as savings bank funds, and secondly, debts due to the state not falling under the description of realisable securities. The first exemption speaks for itself. In the second exemption the original French is *valeurs exigibles*, which Professor Holland translates "realisable securities," and which has been translated officially into German as *eintreibbare forderungen*. Professor Holland describes it as purposely ambiguous, and there are grave differences of opinion as to what the rule on the matter ought to be. There is no doubt that if the occupation should be ripened into conquest, all the debts due to the extinguished state will belong by the laws of state succession to the conqueror and may be sued for by him[2]. There is also no doubt that documents payable to bearer may be seized by an occupant as part of the state treasure, so that he thereby becomes not only their actual but their lawful bearer, and can sue on them as soon as due, whether or not his occupation of the place where they were seized has continued in

[1] The passages in this paragraph in quotation marks are from Hall, §§ 135, 156.

[2] See my *International Law—Peace*, 2nd edn., pp. 68, 74.

the mean time or not. But the occupant who is not a conqueror does not represent the person of the enemy state, and therefore, as it seems to me, can supply nothing which remains to be done by the enemy state in order to complete the right to judgment on a debt. If he has seized a document payable to order, he cannot endorse it: if the debt is claimed by any other kind of title, he may have seized the evidence necessary for proving it but he cannot put himself forward as plaintiff, or use his physical power in the locality to enforce payment. This however is not the modern German view. By an ordinance of 26 November 1870 the Germans required persons who owed payments for timber from the state forests, in what they had established as "the general government of Alsace," to make those payments to their cashiers in the district[1]. And this is approved by no less an authority than Rivier, on the ground that the absence of the relation of debtor and creditor between the person owing and the occupant furnishes an argument valid only from the point of view of private law, it being sufficient from the point of view of public law to say that the occupant exercises the rights of the supreme power in the state, and may therefore compel the payment of matured debts. In those words, if we may venture to say so, there is a confusion between the strongest power in the district, which is certainly that of the occupant, and the supreme, which implies or ought to imply supreme legitimate, power in the state, which is not that of an occupant. It can scarcely be doubted that by *valeurs exigibles* the authors of the Hague code intended matured debts, but it may still be contended that their silence as to any other condition than maturity does not prove that, in denying to an occupant the right to exact debts not matured, they intended to allow him to exact money due to the enemy state from any persons whom he can physically coerce, or on the ground that the consideration for the debt, as timber from a forest, is connected with the occupied district[2].

[1] All payments to the French treasury had already been forbidden by an ordinance of 29 August 1870, rightly, since such payments would have strengthened the enemy. But that the debtors were restrained from paying their creditors did not make them liable to pay anyone else.

[2] See Rivier, 2 *Principes du Droit des Gens* 307, 308. He quotes

The second paragraph of H LIII, in which in 1907 general terms were substituted for an enumeration of the things dealt with, concerns two classes of things belonging to companies or private persons. One class, composed of railway plant, land telegraphs, telephones and ships, consists of things liable indeed to be much deteriorated by rough usage, but which, unlike most things requisitioned, would in general remain in some condition at the end of the war, and which during the war the occupying force would need to keep under its control, as well to prevent their use by the enemy as for its own use from time to time. For these the obvious rule is that they shall be restored at the peace so far as they then exist, and the article adds that the indemnities for them shall be regulated at the peace, a formula which, one step in advance of that employed about receipts in the case of ordinary requisitions, seems to admit that there is a liability somewhere but does not fix it on either side. As to this class, H LIII in 1899 repeated B VI with the addition of telephones. The other class of things consists of depôts of arms and generally all kinds of munitions of war, as to which there is the same necessity for preventing their use by the enemy, but which would not in general continue to exist and have any substantial value after their use by the occupant. B VI enumerated these among means of a nature to be used in the operations of the war, thereby allowing their seizure by the

Löning, 5 *Revue de Droit International et de Législation comparée* 105, 106, who makes the same distinction between the principles of private and public law, and expressly disallows the exaction of payments in advance of maturity. Löning adds: *toutefois la poursuite de ces créances* (those which he allows to be got in) *ne peut avoir lieu que dans les limites du territoire occupé. Là où s'arrête l'occupation, expire le droit de l'occupant.* What then is to be the force of receipts given by the occupant, if the legitimate government sues for the debts outside the occupied territory, in its capital or in a neutral country? To the rules of jurisdiction on which the force of foreign proceedings, or of receipts given in order to avoid foreign proceedings, is founded, must there be added a jurisdiction of a military occupant? Since public law cannot help reacting on private law, it ought not to leave the principles of private law out of account. What I conceive to be the true rule is maintained by Heffter, § 134, and Calvo, § 1977. Pillet allows an occupant to enforce payment of the interest on a debt due to the enemy state, but not that of the principal: *Le Droit de la Guerre*, 2*me p*ie, p. 215.

occupant, but did not include them among the things to be restored and the indemnities for them regulated at the peace. The growing respect for private property caused them to be so included in the *Manual* of the Institute of International Law, Art. 55, and they are now so included by H LIII.

ART. LIV. *Submarine cables connecting an occupied territory with a neutral one shall not be seized or destroyed except in case of absolute necessity. They also must be restored and the indemnities for them regulated at the peace.*

This regulation is due to the Spanish delegation, which proposed it unsuccessfully in 1899 but successfully in 1907.

On three points relating to submarine telegraph cables there is universal agreement. Such a cable connecting two neutral territories is inviolable. A cable connecting the territories of enemy belligerents, or two parts of the territory of one of them, may be cut in the territorial waters of either or in the open sea, but not in neutral territorial waters if it should happen to pass through them. And a cable connecting a neutral with a belligerent territory may be cut in the territorial waters of the latter, but not in those of the former. But whether a cable connecting a neutral with a belligerent territory may be cut in the open sea by the enemy of the latter is a question which H LIV leaves open. The three points agreed on are covered without controversy by the principles that a belligerent may do acts of war in his own or his enemy's territory or territorial waters, but not in those of a neutral, nor in the open sea against neutral property not implicated in offences against the international rules of contraband or blockade. In this the term "property" is not limited to its sense in internal law. A telegraph cable cannot be attached to the shore except by the territorial sovereign or by virtue of a concession from him, granted from public motives and always subject to public control, so that it is a public institution belonging internationally to the state, even although it may in the narrower sense be the property of a company. If the cable connects different states it belongs to both, and if they are respectively neutral and belligerent it cannot be cut without violence being

done to the neutral interest. That is justifiable in the territorial waters of the belligerent partowner, because property durably affixed to the soil must share the fate of the soil, as in liability to requisitions and contributions on land. It would not be justifiable to subject the neutral interest to violence in the open sea, and thus the principles which govern the undisputed cases dictate a negative answer to the question put in the fourth place, the decision in all being independent of the legal property in the cable being vested in a state or in a company.

Nevertheless the Institute of International Law in 1902 adopted resolutions with regard to submarine telegraph cables which, while otherwise in accordance with what we have said, laid down that "a cable connecting a neutral territory with the territory of one of the belligerents cannot be cut in the open sea unless there is an effective blockade, and then within the limits of the line of blockade, and subject to the duty of reestablishing the cable in the shortest time possible[1]." This was carried by a large majority, the reporter in its favour being the eminent Professor von Bar, and the equally eminent German and French jurists, Herr Perels and MM. Renault and Lainé, voting in the minority only because they objected to the liberty of cutting the cable being restricted to the existence and line of a blockade. M. Renault invoked, not indeed the rules, but what he contended to be the principle of the law of contraband. Ships may be visited, and confiscated if they are found to carry contraband despatches: the right is used sparingly against postal packet-boats, but it exists. Despatches are now sent by telegraph, and "belligerents must find in the new situation an equivalent for the protection which they have lost." The new defence by cutting cables in the open sea must be admitted, "because otherwise there would no longer be any means of defence at all[2]." Herr Perels declined to concern himself with an enquiry into the principles of contraband, blockade or angary, "fearing lest such ideas should complicate the discussion by leading to endless developments.....It is desirable to have free communications, but it is impossible to sacrifice the interests of belligerents.

[1] 19 *Annuaire* 332.

[2] Ib., p. 314.

Military necessities must be reckoned with. We can in the Institute propose what we like, but the question is what governments can adopt[1]." General den Beer Poortugael gave to these arguments the conclusive (as we think) answers that "there is no necessity of war against neutrals because there is no war against them"; and that unless you can sink a packet-boat because bad weather or the approach of an enemy prevents your verifying by a visit her having obnoxious despatches on board, cutting a cable when you cannot ascertain what despatches are sent by it has no analogy to the procedure in the case of contraband[2]. Professor von Bar, who also rejected both the doctrine of military necessity and the analogy to contraband, took the view, which the Institute appears to have adopted, that the principle of blockade is to prohibit all communication with the blockaded coast, and that communication by cable is a breach of that principle[3].

In truth, against all these attempts to impose fresh burdens on neutrals by extending the rules of blockade and contraband there lies the objection, deeper than that arising from the failure of any particular analogy, that those rules are not due to principle but to compromise, and therefore furnish no standing-ground on which a deductive extension can rest. Any extension must be the independent result of agreement, express or tacit, and in the latter case long and well tried. Meantime the general principles of neutrality, the only ones which as yet there are in the case, deny to a belligerent, blockade or no blockade, the right of cutting a neutral or neutral-belligerent cable outside territorial waters. It follows, if that is so, that a neutral may legitimately resent any such cutting of a cable in which he is interested, so long as no rules permitting it have received his assent, or have become a part of international law in the regular progress of its development.

We shall see that neutrals are not entitled to an indemnity for the damage suffered through lawful acts of war by the property which they have connected with a territory under military occupation by their residence or business in it[4]. On the same principles a neutral state or company, interested in

[1] 19 *Annuaire*, pp. 309, 310.
[2] Ib., pp. 313, 316.
[3] Ib., pp. 16, 308, 316.
[4] Below, p. 128.

a cable landed in belligerent territory, can claim no indemnity when the enemy cuts it in that territory or the waters belonging to it[1]. If international agreement should ever make it lawful to cut it in the open sea, justice would require that the same agreement should declare an indemnity to be due.

ART. LV. *The occupying state shall regard itself as only administrator and usufructuary of the public buildings, immovables, forests and agricultural undertakings belonging to the enemy state and situated in the occupied country. It must protect the capital of those properties and administer it according to the rules of usufruct* (life tenancy).

Immovable property, which comprises the real property and leaseholds for years of English law, whether belonging to the state or to private persons, cannot be appropriated by an occupant. If it belongs to private owners, they or their agents remain on the spot for its management, subject to such interference as military necessity may require; but if it belongs to the state the duty of its management is almost necessarily

[1] In May 1898, during the Spanish-American war, Admiral Dewey cut at Manilla the telegraph cable from Hong Kong. The British Eastern Extension Australasia and China Telegraph Company claimed $36,000 damages from the United States, but on the ground here taken the Attorney-General of the latter advised his government that the claim was untenable. He added that the admiral's desire himself to use the cable, of which he buoyed the severed end, made no difference to the question of indemnity, considering that he did not use it. See the *Washington Evening Star* of 4 February 1899, as quoted with approbation, 7 *Revue Générale de Droit International Public* 270, by M. Renault, who adds that if Admiral Dewey had used the cable, not merely for official despatches but for despatches for which the company would have been paid, he should have considered that the profit ought to have been accounted for to the company. We agree. An example of an opposite kind was given by Chile in its war with Peru which ended in 1883. She had cut the cable of a British company connecting the two countries, and her government admitted and satisfied the claim of the company to compensation, without referring it to the mixed commission under the Anglo-Chilian convention of 1883. Letter in the *Times* of 1 June 1898, quoted 25 *Journal de D. I. P. et de la J. C.* 813.——The international convention of 14 March 1884 on submarine telegraph cables expressly reserved that its stipulations *ne portent aucune atteinte à la liberté d'action des belligérants.*

thrown on the invader, and he is entitled to the profits, as well for his remuneration and an inducement to good management as because, so far as they are in tangible shape, he can seize them like any other corporeal movable property of the enemy state. Perhaps too the confusion of occupation with conquest has left some trace on the relation of the occupant to public immovables, and caused him to be regarded as their temporary owner. But, whatever the explanation, there is no doubt that the occupant is entitled to get in the rents and dues of public immovables maturing during the occupation, and that his receipt for them will be a good discharge as against the enemy state, whatever opinion may be held on the general question of an occupant's right to enforce payment to him of debts due to that state. If the sovereign of the invaded state owns immovables in his private capacity, there is the same necessity for their management by the occupant, who cannot be expected to discriminate between the agents of the sovereign in his private and in his political capacity, but it may be presumed that the respect now paid to private property would cause him to account for the proceeds at the peace.

In the case of forests, the right of a usufructuary is to cut the trees which regularly come to cutting during his tenancy; and this right the occupant has, subject to the condition that those who buy the timber from him must remove it during the continuance of the occupation, for the restored government would not be bound to allow its removal. And if the occupant sells timber which has not regularly come to cutting, the courts of the legitimate government will give no effect to any claims founded on such an illegal transaction[1]. In the case of public buildings, their furniture is considered as belonging to them, so that it must not be carried off, independently of the protection given to objects of art by H LVI.

ART. LVI. *The property of communes, and that of institutions dedicated to religious worship, charity, education, art or*

[1] *Guérin's case,* court of Nancy, 27 August 1872, Dalloz, 1872, II. p. 185, and 1 Clunet 126; *Mohr et Haas c. Hatzfeld,* Nancy, 3 August 1872, and Court of Cassation, 16 April 1873, Dalloz, 1872, II. p. 229, and 1 Clunet 181.

science, even when belonging to the state, shall be treated in the same manner as private property.

All seizure or destruction of, or intentional damage done to, such institutions, historical monuments, or works of art or science, is prohibited and should be made the subject of prosecution.

All local bodies must be considered as included under communes.

The principle of the second paragraph is not new in naval war—see below, p. 158—but it was first extended to land war by B VIII, which H LVI repeats.

Cases not provided for in the Hague Regulations.

We have seen (p. 61) that the Hague Regulations, by the terms of the convention about them, are to be supplemented in cases for which they do not provide by "the usages established between civilised nations, the laws of humanity, and the requirements of the public conscience." These words look both backward and forward; backward to the usages which help to determine the laws of war in their actual shape, and forward to the growth, more than possible, of what the public conscience, interpreting the laws of humanity, may require in the future. Taking first the sanction which they give to the past, it must be said that any thing which has been done in civilised warfare, and is still defended in spite of adverse criticisms, is not to be considered unlawful merely because no clause of the Hague text can be quoted in its favour. Any proposition opposed to it which has been put forward, if it had been deemed at the Hague to be already law or to be proper for enactment, would have been included in the text, of which as of all laws of war the restriction of violence is the main purpose, so that disallowance cannot be inferred from its silence. Those who would disallow what has been done and justified within the recognised pale of civilization may continue their efforts, indeed by the reference to humanity and the public conscience they are encouraged to continue them, but they must not give out their proposition as one of the laws of war until they have procured its admission to a revised code or have silenced its opponents.

An example is furnished by the proposition sometimes laid down that barbarous forces—that is, either savage tribes and barbarous races with their native organization or troops composed of individuals of such tribes or races—must not be employed against a civilised people. In the eighteenth century Red Indians were incited by white powers to act as tribes in alliance with them in their American wars, but the condemnation of any such proceeding is now absolutely universal. On the other hand, there can be no objection to the employment, as soldiers in organized military bodies under civilised command, of any individuals who in fact obey that command and observe the laws of war. It would therefore be frivolous to condemn the employment of British Indian or French Algerian organized bodies, even in war outside the limits of India or Algeria; *a fortiori* if they were defending the respective territory against invasion. In the South African war Kafirs were not used on either side as fighting troops, but they were used by the British in the transport service, to which it does not seem that any reasonable censure can apply.

A further matter as to which the Hague Regulations are silent is that of the fate of the population of a district the devastation of which, so far as the property in it is concerned, is permitted by H XXIII (*g*) as being imperatively demanded by the necessity of the war. Their removal into what are known as concentration camps, where they are maintained but restrained from communication with the enemy, presents itself as an inevitable corollary and has passed into practice. The patriotic conduct of the population, or the mere effect of their situation in the theatre of war, in furnishing the troops on their side with information, refuge, and starting points of fresh operations, may be the cause which makes the devastation necessary. People so placed are made, will they nill they, instruments of war, and must submit to a position as analogous to that of prisoners of war as their position before their removal was analogous to that of the fighting force.

Lastly, it may be worth while to enquire how the civil officials of the territorial or legitimate government are affected by the district in which they serve passing into the occupation of an enemy. It will generally be the better course for the

population whose interest they ought to consult that they should continue to carry on the ordinary administration under the invader, but he has no right to force them to do so. If they decline to do it, his only right, and it is also his duty, is to replace them by appointees of his own, so far as necessary for maintaining order and the continuance of the daily life of the district: other purposes, as those of the superior judicial offices, can bide their time.

Between what parties codified Laws of War apply.

At Christiania in 1912 the Institute of International Law resolved that "in default of any formal clause to the contrary, or of dispositions leaving no doubt of the intention of the parties, collective treaties relating to the law of war do not apply unless all the belligerents are parties to them." This had been laid down for the particular conventions both by those of 1899 and 1907 concerning the Laws and Customs of War on Land, and by that of 1907 concerning the Rights and Duties of Neutral Powers and Persons in War on Land.

The Laws of War in relation to Reprisals.

The next question is one which concerns every possible body of laws of war, whether enacted by convention or resting on the consent of opinion, as well as the Hague Regulations, namely, does it exclude the breach of any law comprised in that body by way of reprisal or retorsion for a breach by the other side? And if the answer is negative, then is the permitted reprisal or retorsion limited to one of the same law which was broken by the other side? Universal practice and consent have given negative answers to both these questions. To the further question, whether any limit at all can be put to breaches of laws of war by way of reprisal, the following answer with reference to land war was given by the Russian draft which formed the base of the discussions at Brussels.

§ 69. Reprisals are admissible in extreme cases only, due regard being paid as far as shall be possible to the laws of humanity, when it shall have been unquestionably proved that the laws and customs of war have been violated by the enemy, and that they have had recourse to measures condemned by the law of nations.

§ 70. The selection of the means and extent of reprisals should be proportionate to the degree of the infraction of law committed by the enemy. Reprisals that are disproportionately severe are contrary to the rules of international law.

§ 71. Reprisals shall be allowed only on the authority of the commander-in-chief, who shall likewise determine the degree of their severity and their duration.

But the conference felt itself compelled to decline to discuss even these moderate propositions, among the reasons given by General Horsford in his report being that "it seemed to be the general feeling that occasions on which reprisals of a severe character had been executed were of far too recent a date to allow the practice to be discussed calmly[1]." Thus neither the Brussels nor the Hague Regulations contain any thing on the subject, and so far as the latter are concerned reprisal forms one of the cases not included in them which they expressly leave to humanity and conscience: we cannot apply to this particular case the reference to "the usages established between civilised nations," because what occurred at Brussels proves that no usages on it are established in the sense of being not merely practised but approved with sufficient definition. But the *Manual* of the Institute of International Law has the following articles, which carry the matter very little further than the Russian propositions at Brussels.

85. Reprisals are forbidden whenever the wrong which has afforded ground of complaint has been repaired.

86. In the grave cases in which reprisals become an imperative necessity, their nature and scope must never exceed the measure of the infraction of the laws of war committed by the enemy.

They can only be made with the authorisation of the commander-in-chief.

They must in all cases be consistent with the rules of humanity and morality.

It will be observed that in the last clause "in all cases" replaced the Russian "as far as shall be possible," and that Art. 85 was new.

It is probably impossible to say more on the subject in general terms, and with regard to its total omission in the

[1] See above, p. 60, note 1.

official codes we will associate ourselves with what the Russian delegate, General Jomini, said at Brussels. "I regret that the uncertainty of silence is to prevail with respect to one of the most bitter necessities of war. If the practice could be suppressed by this reticence, I could but approve of this course. But if it is still to exist this reticence may, it is to be feared, remove any limits to its exercise. Nevertheless, I believe that the mere mention in the protocol that the committee, after having endeavoured to regulate, to soften and to restrain reprisals, has shrunk from the task before the general repugnance felt with regard to the subject, will have a most serious moral bearing. It will perhaps be the best limitation we have been able to affix to the practice, and especially to the use which may be made of it in future."

The difficulty of obtaining a more precise definition of the right of reprisal in war calls for a jealous examination of the principle on which it rests, in order that no false theoretical view may assist the tendency to excess in practice which results from human nature and is seen in experience. The principle is thus put by Lueder.

> "The right not to observe the laws of war exists in the case of retorsion because, according to known maxims, non-fulfilment by one party deprives that party of the right to claim fulfilment by the other. At least this may be the case in war where, if the violations of the laws of war by the enemy were passed without retaliation, a belligerent would be at a disadvantage and worse off than his enemy who was guilty of the violations, with reference to the end which has to be striven for by all means, namely breaking down the determination of the other side and gaining the victory[1]."

The practical reason for reprisals given in the latter part of this passage is as convincing as any necessity alleged in war can be, but we must record our dissent from the generality of the assertion that a mutual obligation is dissolved by the failure of one party to perform it. If the mutual obligation under which we all lie to obey the law of the land in what concerns one

[1] 4 *Holtzendorff's Handbuch* 255.

another is intended, it is certain that the lawless behaviour of our neighbour towards us does not authorise us to behave lawlessly towards him, but only to call for redress. If the mutual obligation of contract is intended, it must be said that the laws of war are too deeply rooted in humanity and morality to be discussed on the footing of contract alone, except it may be some parts of no great importance which convention might have settled otherwise than it has. Nor, if the footing of contract be accepted for the discussion, is it true in all cases that a contract is dissolved by the failure of one party to perform it. In many cases the other party continues to be bound, although entitled to damages for the breach. The true basis of the right of reprisal in war seems to be, not the impairment of any obligation, but the redressing, by punishment or the exaction of damages, of a violated obligation. And thus the articles which have been quoted from the *Manual* of the Institute occur in its "Part III—Penal Sanction." If it can get to be generally felt that the illegalities of the enemy do not set a state or its commanders loose from law, but entrust them with a right, not capricious but sacred, to vindicate law by fitting punishment or the exaction of fitting reparation, it may be expected that excessive reprisals, and reprisals falling on innocent parties, will be of less frequent occurrence.

Are the Laws of War liable to be overridden by Necessity?

Another question which concerns every possible body of laws of war as well as the Hague Regulations is whether its observance ceases to be obligatory "when the circumstances are such that the attainment of the object of the war and the escape from extreme danger would be hindered by observing the limitations imposed by the laws of war[1]." An affirmative answer is commonly given in Germany, where a distinction is made between the ordinary rules of war (*kriegsmanier*, *les lois de la guerre*), and what is permitted in virtue of the overmastering necessity referred to (*kriegsraison* or *kriegsräson*, *raison de guerre*), both being included in the law of war (*kriegsrecht*, *le*

[1] This is Lueder's language, 4 *Holtzendorff's Handbuch* 255. The classical passage referred to covers §§ 65, 66.

droit de la guerre); and a maxim is current that *kriegsräson geht vor kriegsrecht* (it should be *vor kriegsmanier*), which we may translate "the reason of war overrides its ordinary rules." Rivier also supports this view, saying *la nécessité de guerre peut excuser des rigueurs que les lois de la guerre condamnent. Elle prime les lois de la guerre*[1].

In what may be regarded as the classical passage on the doctrine, Lueder supports it on two or three grounds, which we will give fully in order to do justice to what we regard as highly pernicious. One is that commanders will act on it, whatever may be laid down. "It ought to happen because it must happen, that is, because the course of no war will in such extreme cases be hindered and allow itself to end in defeat, perhaps in ruin, in order not to violate formal law." This ground reduces law from a controlling to a registering agency[2]. Another ground is that "if the necessity of individuals is recognised as exempting them from punishment for things never so injurious done by them from that necessity, this must be still more the case in war, since so much more is at stake." This attributes to necessity a legal effect which it may have had in Roman but certainly has not in British law[3]. Again it is said that "*kriegsraison* is related to the law of war as necessity to criminal law, and it might be said with the same right and supported by the same argument that there was no criminal law because its rules have not to be observed in cases of necessity." This reads at first sight like a repetition of the second ground, but is perhaps meant to present necessity from the point of view of a government, which may have to disregard the ordinary criminal law in times of insurrection or great disturbance. And probably the view of *kriegsraison* which is taken by its advocates is best expressed by comparing it to martial law or the state of siege within a state. But such a comparison would encourage in military commanders a tone of moral superiority to the enemy which must be detrimental to moderation, the tone in which we have seen a desperate though hopeless resistance denounced

[1] *Principes du Droit des Gens*, t. 2, p. 242.

[2] See above, p. 56.

[3] Necessity as an excuse in law is discussed in my volume on *International Law—Peace*, 2nd edn., pp. 296–299.

as culpably frivolous, and entitling the stronger party to take any measures.

In any case the struggles of its advocates to make out that their *kriegsraison* is not inconsistent with allowing legal force to the ordinary laws of war prove that the necessity which they invoke is to be distinguished from the ordinary necessity, inherent in all the operations of war, of which account must be taken in drawing up any body of rules for belligerents. Of that necessity the Hague convention introducing the Regulations notes that account has been taken in them[1]. The term *kriegsmanier*, the custom or we might almost say the etiquette of war, was first used when belligerents were restrained only by the courtesy of commanders and the sense that a more or less orderly behaviour towards the enemy was indispensable to the discipline and effectiveness of their own forces. It has grown to a code in which humanity to the enemy on the one side and the essential needs of war on the other have been considered. And the question raised under the term *kriegsraison* is not whether that code is defective, or misconceived in any of its clauses, but whether a necessity, not of war but of success, is to be allowed to break it down. It is contended in effect, however innocent may be the intentions of authors, that the true instructions to be given by a state to its generals are: "Succeed—by war according to its laws, if you can—but, at all events and in any way, succeed." Of conduct suitable to such instructions it may be expected that human nature will not fail to produce examples, but the business of doctrinal writers should be to check and not to encourage it. Otherwise, the most elementary restraints on war, which have been handed down from antiquity, are not safe.

[1] See above, p. 61.

CHAPTER V.

NEUTRAL POWERS AND PERSONS IN WAR ON LAND.

The Rights and Duties of Neutral Powers and Persons in case of War on Land were made at the Hague in 1907 the subject of a separate convention, to which the few articles relating to them in the code for land war of 1899 were transferred. There are 20 articles besides the formal ones, and a summary account of them will be sufficient, as most of their tenour was already a part of the common law of nations.

The territory of neutral powers is inviolable (1), and belligerents may not move either troops or material across it (2)—or instal on it any wireless or other apparatus intended to serve as a means of communication with belligerent forces on land or sea, or use any such installation which they have already installed on it for purely military purposes and have not opened for public correspondence (3)—nor can corps of combatants be formed or recruiting offices opened on it in the interest of a belligerent (4). A neutral power must not allow on its territory any act prohibited by (2), (3) or (4), though it does not incur responsibility by the fact of persons crossing its frontier singly in order to enter the service of a belligerent (6), and it is not bound to punish unneutral acts not committed on its own territory (5).

A neutral power is not bound to prevent the export or transit on behalf of a belligerent of arms, munitions of war, or generally of any thing which may be of use to an army or a

fleet (7)—or to prohibit or restrict the use for belligerents of telegraphic or telephonic cables or wireless apparatus, whether its own property or that of companies or individuals (8)—and a neutral power (9) must apply impartially to the belligerents, and see that companies and other private owners so apply, any prohibition or restriction with regard to the matters referred to in (7) and (8).

A neutral power's repelling infringements of its neutrality, even by force, cannot be considered as a hostile act (10).

Belligerent troops received in neutral territory shall be interned (11), and in the absence of a special convention the neutral power shall supply their needs and be repaid at the peace (12). Escaped prisoners of war who are received in neutral territory, or are brought there by troops taking refuge, are freed, but if allowed to remain in the territory may be assigned a place of residence (13). Belligerent trains carrying their own wounded or sick may be allowed a passage across neutral territory, on condition that they carry neither *personnel* nor material of war. If the wounded or sick belong to the adverse party, or are committed to the care of the neutral power, they must be so guarded by the latter as to ensure their not taking part again in the operations of the war (14). The Geneva Convention applies to the sick and wounded interned in neutral territory (15).

We now come to three articles—(16), (17) and (18)—which are the remains of twelve forming a scheme proposed by Germany with a view, among other things, to differentiating the legal position of the subjects of neutral states and their property in belligerent territory from that of the nationals of the territory. That scheme was not generally accepted, and Great Britain reserved even the three articles in question from her signature to the convention, while their adoption in the convention at all is attributable to their being concerned with definitions of no great importance by themselves. With them must be taken (19), which deals specifically with the rolling-stock of foreign railways found in belligerent territory, replacing the H LIV of 1899 with fuller expression but in the same sense, which was not that of the rejected scheme, so that there was some inconsistency of principle in the positions taken in 1907.

19. Railway material coming from the territory of neutral powers, whether belonging to those powers or to private companies or persons, and recognisable as such, shall not be requisitioned or utilized by a belligerent except in the case and to the extent required by an imperious necessity. It shall be sent back again as soon as possible to the country of origin. The neutral power may likewise in case of necessity retain and use to a corresponding extent the material coming from the territory of the belligerent power. Compensation shall be paid on either side in proportion to the material used and the length of usage.

On the question of principle whether the persons and property of the subjects of neutral states, so far as they may be found within enemy territory, are exposed to the violence of war equally with the persons and property of enemy subjects, there is no doubt that as a general rule they are so exposed. Neutral subjects have no claim to be allowed to leave a besieged place, except perhaps diplomats when military necessity does not oppose[1], and neutral residents have to furnish their share to money contributions. With regard to requisitions of things or services, an invader can rarely have much time for drawing distinctions, but if he had the time he would probably choose to take what he wanted from enemy rather than from neutral subjects, without prejudice to his right to take it from the latter in case of need without incurring greater liability than he would incur towards the former. These are the chances which neutral individuals and companies residing or carrying on business in a foreign country must run, for themselves and for all property which they possess in that country in connection with such residence or business, whether the residence amounts to domicile or not. They increase the strength and wealth of that country, and to protect them against the consequences of an invasion of it would be an intolerable task for their own governments. The same reasons do not apply to property which may enter a territory in the course of a business carried on elsewhere, and which in the same course would soon leave it again. Such is the rollingstock of a foreign state or railway company, which cannot avoid crossing and recrossing the frontier from time to time, or a ship which enters a port of the territory in the course of the trade of a merchant in a foreign country, to whom

[1] See what is said under H XXVIII, above, p. 89.

she belongs or by whom she is chartered. In such cases the neutral owner has in some measure entrusted his property to the fortunes of the enemy, though not so far as to identify it with him, and the just course is to allow it to be requisitioned for a real military necessity, compensation being paid. In the case of rollingstock the invader may further plead that it takes the place of a corresponding quantity belonging to the railways of the country, which is probably abroad, or that if those railways are worked by the aid of foreign rollingstock in excess of an equal exchange, then the foreign owners who consent to that mode of working are really carrying on business in the country. In 1870–1871 the Germans detained and used large quantities of Swiss and Austrian rollingstock in France, and were deaf to demands for its return. The same principles were applied to ships during the war of 1870. The German commander at Rouen desired to sink in the Seine at Duclair certain British vessels trading with France, in order to bar the way to French gunboats. The captains refused to unload them and accept payment of their value, and they were then sunk by force, which was quite fair, if it had not been done by firing on them while some at least of the crew were on board[1]. Compensation for the persons whose property was destroyed was demanded by the British Government, without disputing the right to sink the vessels, and was paid.

It is therefore clear that the return of rollingstock "as soon as possible," which was required by the H LIV of 1899 as well as by the (19) now before us, was not by the former, any more than by the latter it is now, intended in a wider sense than to prevent its abusive detention, and, by acknowledging the right to its return, to make it the invader's duty to pay compensation for its use and deterioration. That interpretation was given in 1899 by M. Renault and the majority of the committee, repelling the Belgian proposal to require the immediate return of neutral rollingstock; and when in 1907 it was proposed by Luxemburg that within a certain time after the outbreak of war all neutral railway material should be returned

[1] The excuse made was that the refusal of the captains to enter into an agreement was an infraction of neutrality!

to the country of its origin, General von Gündell objected for Germany that this would entirely disorganize the transport and mobilisation of troops.

We are now in a position to appreciate the discussion on the principle of the German scheme of twelve articles above mentioned. It was supported by the United States of America, Austria-Hungary and Switzerland, and began with a definition of neutral persons (16) intended to lead the way for making all rules about them turn on their permanent political character, and for placing their property invested in belligerent territory in the position which we have claimed for that entering the territory in the course of a business carried on elsewhere, and which in the course of that business would soon leave it. This revolutionary proposal could in the matter of legal reasoning only appeal to that kind which makes a merit of grouping every thing under the largest affirmations—here, for instance, making the political character of a person the test of every thing relating to him—with the addition by the German delegation that their view was imposed on them by treaties which their country had concluded[1]. The United States and Swiss delegations pleaded that it was humane to exempt as many as possible from the evils of war. The received theory and practice—that neutrals established in the territory of a belligerent state, and their property there invested, are exposed to the chances of war equally with the subjects of that state and their property—were maintained by Great Britain, France, the Netherlands, Japan and Russia[2], whose delegations pointed out that immigrant settlers who have not changed their nationality may be called on to serve in the defence of their new countries—that if a neutral settler objects to such service, he has no right to be indemnified against the evils of war—that an invading

[1] The Baron Marschall von Biberstein mentioned treaties exempting the subjects of the contracting powers from military *prestations* in one another's territories. Did he mean that this would apply to occupied territories as if they were the proper territories of the occupant?

[2] It will not escape notice that these include most of the powers most brought into contact with the question by having from time to time to conduct hostilities in countries abounding with foreigners not naturalized in them.

general cannot distinguish neutral property—that a position good enough for the nationals of an invaded country is good enough for the foreigners who have established themselves there—that contributions are imposed *ratione loci* and not *ratione personæ* (M. Léon Bourgeois, representing France)—that many Far-Eastern countries do not possess any legislation on nationality, and in those parts there are numbers of persons whose nationality is uncertain, or can be changed at a moment's notice for interested reasons (Japanese delegation)—and that since no country distinguishes between its nationals and resident foreigners in granting relief on the occasion of a national calamity, as an inundation or a volcanic eruption, no distinction can justly be claimed by the latter with regard to the sufferings caused by war (General den Beer Poortugael, representing the Netherlands).

The invader's right as to neutral property is sometimes spoken of as one of angary, a name given to the right of a prince to impress neutral ships lying in his ports at the outbreak of war. The conditions of modern naval war are such that that right cannot now be often useful, though it was once of considerable importance, but it seems still to exist in case of real necessity, and its exercise would certainly be subject to the duty of compensation. Any right, however, of a sovereign in his own territory could scarcely be made to apply to the claims of an invader except on the exploded notion of occupation being conquest, and it is therefore better to discuss the claims of an invader on their separate merits.

It has further to be mentioned in connection with the subject of the present chapter that the Hague Conference of 1907 embodied in its Final Act the two following earnest desires (*vœux*).

2. The conference expresses the earnest desire that in case of war the competent authorities, civil and military, should make it a special duty to ensure and protect the maintenance of pacific relations, and notably of the commercial and industrial relations between the populations of the belligerent states and neutral countries.

3. The conference expresses the earnest desire that the powers should regulate by special treaties the situation, as regards military charges, of foreigners established in their territories.

Since the object of an invasion is to cripple the invaded state, and the commercial and industrial relations between its inhabitants and neutral states are an important means of preventing its being crippled, it does not seem likely that invaders will exchange the practice of hindering those relations for that of fostering them. But the second of the above *vœux* is a very proper one, and will be understood when it is remembered that several Spanish-American states, led by the great immigration into them to claim the children of immigrants as subjects by reason of their birth on the soil, have been engaged in controversies with European powers who have considered that the principle of nationality by parentage ought to exempt such children from military service[1].

[1] See my *International Law—Peace,* 2nd edn., p. 218.

CHAPTER VI.

NAVAL WAR AS BETWEEN BELLIGERENTS.

The title of the present chapter is intended to exclude those parts of our subject which raise the question of what belligerents assert to be their rights against neutrals as such; for example, blockade, contraband of war, visit and search, and the unneutral employment of neutral territory. So far as neutrals may be affected by the operations of a belligerent based on the rights claimed by him against his enemy—for example, when of a ship and its cargo one is enemy property and the other neutral, or when a belligerent claims to treat a neutral subject as his enemy on account of his conduct—the consideration of the questions raised cannot well be separated from that of the operations themselves.

[*Private Property at Sea and Persons on board Merchant Ships.*

In the dark and middle ages war was conducted at sea as well as on land in accordance with the principle of solidarity, which established the relation of enemies between each party and all its subjects or citizens on the one side and the other party and all its subjects or citizens on the other side. To this there was added for naval war the absence of the modern notion of a ship as floating territory[1], with the consequence that not only ships at sea but also their cargoes and the persons on board were regarded as so many valuables which might be picked up in "no-man's-land," the circumstance that to get at them you

[1] See my *International Law—Peace*, 2nd edn., pp. 167, 168, 264.

must board the ship then appearing to be quite without importance. The legal ideas of the time therefore presented no obstacle to the seizure and detention or appropriation by a belligerent of the persons and property of all enemy nationals whether on board enemy or neutral ships, together of course with the ships themselves, if enemy ones, and the neutral nationals serving on board them. And the motives for putting in force all the rights given by the current legal ideas were even stronger at sea than on land, inasmuch as the trade and fisheries of the enemy were desirable objects of conquest.

(A) *Property: history to* 1907.

The rules of naval war as to property which resulted from these principles are formulated in the Consolat del Mar[1], a code of maritime law which enjoyed wide acceptance in the Mediterranean, and in its existing form appears to have been drawn up at Barcelona in the Catalan language at some time in the fourteenth century, but which certainly embodies a much older usage. By chapter 231 of that code the admiral may compel a friend's ship to carry her cargo the property of an enemy to a place of safety (the *intra* or *infra præsidia* of the Latinists), paying the freight which the ship would have earned by carrying the cargo to its destination; and in case the friend should refuse so to carry it, the admiral may sink the ship if the cargo or the greater part of it is enemy's property, "saving always that he ought to save the lives of those on board of her." On the other hand the admiral is bound to take an enemy's ship carrying friends' property "to the place where he was fitted out," and the merchants—that is, the cargo-owners—must pay him the freight which would have been earned by their property being carried to its destination; but the merchants may require him to let them have the ship "for a suitable price," and if he refuses he will earn no freight and must make full compensation to them. By chapter 245 a friend

[1] Often called the Consolato del Mare, its name in the Italian version. It forms vol. 3 of Sir Travers Twiss's *Black Book of the Admiralty,* in which its chapters 231 and 245 are at pp. 539 and 611; and it is also printed in the second volume of the *Collection de Lois Maritimes* by Pardessus.

recapturing a ship which the captor has not brought to a place of safety must receive a suitable salvage reward, "according to the maltreatment which they [the owners] may have undergone and according to the loss which they may have incurred"; but if the ship had been brought to a place of safety, the recaptor will be entitled to her. Here we have all the leading elements of the system, namely enemy property, whether ship or cargo, capturable, while neutral property, whether ship or cargo, is free—the neutrals purchasing its freedom by having the destination both of their cargo on board an enemy's ship and of their ship carrying enemy's cargo changed for the captor's convenience, they paying or receiving the freight which would have been due for the voyage intended but thwarted, with the saving provision that the neutral cargo-owners may buy an enemy's ship from the captor at a fair price if they like to continue their voyage—the rule that the property of the prize is vested in the captor when, and only when, he has taken her where she can be considered as fully reduced into his possession—and the admiral as the authority on the side of the captor.

The title of admiral was derived from the Saracenic *emir*, and is said to have come into use about the time of the fourth crusade[1]. But whatever may have been his older designation, the officer in question was originally the commander of those fleets of armed merchantmen which used to sail as consorts for their better protection against pirates and enemies, and may often have held no commission except from his employers, although no doubt in many cases the civil authorities of the ports early intervened to arrange such fleets and appoint their leaders. In England the maritime towns were less populous and wealthy than in the Mediterranean, and lay nearer to the central power of a great prince, who, having no special navy of war, was in the habit of assembling the mercantile navies of his subjects, armed as all such then were, for his own public enterprises. We should expect therefore to find the royal authority exerting

[1] If so, the statement in Art. 17 of Part C of the *Black Book of the Admiralty*, that "this order was first made at Ipswich in the time of Henry the first by the admirals of the north and west and other lords thereat assisting," must employ the title by anticipation. Twiss's edition, v. 1, pp. 64, 65.

itself in all maritime matters, and in fact, while in 1300 we meet with Gervase Alard as admiral of the Cinque Ports, on the other hand we meet in 1295 with an admiral "of the Bayonnese fleet of Edward I," in a document of 1296 the office is called Admiratus or Admiralty, and in the same year there is mention of "Amiraux de nostre navire d'Engleterre." But the courts of a martial nature by which these officers maintained discipline and, no doubt, regulated the affairs of the merchants and shipowners arising on their voyages, had not yet become a definite part of the English judicial system. "In a case which came before the Common Pleas in 1297, as to a ship which had been seized at sea and brought into a Norfolk harbour, it was suggested by the defence that the matter was properly triable before the admiral and not in the king's court. The judges however would not listen to the suggestion, saying 'of the power of the admirals of whom you speak we know nothing.'" But during the fourteenth century a great change took place. "In 1339 and for many years before claims made against the king of England by foreign sovereigns, in respect of depredations committed by Englishmen at sea, had always been referred to arbitrators or dealt with by the ordinary courts." "In 1357 for the first time we read of the admiral holding a court. In that year the king of Portugal claimed redress from Edward III in respect of some Portuguese goods which had been captured by an English ship on board a Frenchman. The answer given by Edward was that the owners had already taken proceedings for recovery of the goods before the admiral, in which the goods had rightly been decided to be good prize[1]." And about the same time the dignity of admiral was raised by the appointment of one for all the realm, and, probably, the term "high admiral" was introduced. Twiss says: "when this term first came into use is not certain, but the first admiral of all the fleets of ships—south, north and west—was Sir John de Beauchamp, 34 Edward III. His commission will be found in Rymer, *Fœdera*, iii, p. 505[2]." The admiral of France, his

[1] The quotations thus far made in this paragraph are from R. G. Marsden, *Six Centuries of the Admiralty Court*, in 67 Nautical Magazine 86–88.

[2] Twiss, *Black Book of the Admiralty*, v. 1, p. 55, note. Local admirals however are still met with later.

lieutenants, and his jurisdiction, appear in an ordinance of Charles V, dated 7 December 1373[1].

The system of the Consolat with respect to enemy and neutral property was the common law of the Mediterranean, and in England the Black Book of the Admiralty, by Art. 7 of its Part B which Twiss assigns on internal evidence to a date between 1337 and 1351, adopts the rule that enemy property is good prize in neutral ships[2]. But in spite of the assertion commonly made that in this country the system of the Consolat was adopted in its entirety, the rule that neutral property is to be free in enemy ships does not seem to have been approved during the middle ages by English policy. In 1294, during war between England and Spain, the former power forbade the Portuguese to carry Spanish cargoes. In 1338 Edward III requested the king of Castile to prohibit commerce between his subjects and the Flemings, with whom England was at war, but the Castilians declined to comply. And a line of treaties by which England stipulated that neither party was to comfort the enemies of the other, or to suffer that they have aid from his country, begins with one with France in 1303[3], and includes one of some unknown date which appears to have existed with Scotland[4]. The st. 20 Hen. VI [1461–2], c. 1, expressly lays down that the king's subjects taking goods laden in enemy's ships shall have them as their own; and the line of treaties referred to is continued by those of Edward IV with Burgundy, 1467 (no enemies' goods to be admitted by sea)[5], with Brittany, 1468[6] (persons and goods on board enemy ships to be good prize), and with Burgundy again, 1478[7] (mutual agreements not to carry enemies' goods, and to submit to visit for enforcing

[1] Printed by Twiss, op. cit., v. 1, p. 430. On the ancient procedure in France on matters of prize see Dumas, 16 *Revue Générale* 5–45.

[2] The Black Book appears to have been compiled for the use of the Duke of Exeter, Admiral, who died in 1446. Twiss's judgment of the age of Part B is in op. cit., p. xxx.

[3] 2 Rymer, *Fœdera*, 927 (954, edition of 1816).

[4] Sir Ralph Sadler's *Letters and Negotiations in Scotland*, p. 381, quoted in Robinson's *Collectanea Maritima*, p. 58, note.

[5] 11 Rymer, *Fœdera*, 596. [6] 11 Rymer, *Fœdera*, 622.

[7] 12 Rymer, *Fœdera*, 73.

such agreements, which stipulations were also in the treaty with Brittany). It seems to have been thought that the neutral who entrusted his goods to the ship of an enemy gave aid and comfort to the latter, by the freight which he enabled him to earn, by the useful commodities which he caused to be imported into his country, and perhaps not least by the assistance which the merchants who accompanied their goods were likely to give in the defence of the ship, in times when every one had to be more or less a fighting man. In the face of the facts quoted, including the judgment of 1357 mentioned on p. 139, coupled with the silence of the Black Book as to any thing more than we have adduced from it, treaties concluded by England with the maritime towns of Biscay and Castile in 1351[1] and with the cities of Portugal in 1353[2], stipulating the freedom of neutral goods in enemy ships, are scarcely a sufficient base for the assertion that the English practice on that point then agreed with the Consolat del Mar. It is more likely that the currency of that document embraced the Atlantic as well as the Mediterranean ports of the Spanish peninsula, and that these obtained the adoption of its system in their treaties with England, than that the latter country spontaneously took up for a few years a line to which neither its earlier nor its later manifestations during the middle ages point.

In France the ordinance of 1533 adopted the rule that neutral goods in enemy ships are good prize, and that of 1543 added to it the rule that a neutral ship carrying enemy goods is good prize, so that the maxim *robe d'ennemi confisque robe d'ami* resulted: whether the enemy property was the ship or the cargo, it infected the other and both were condemned. The ordinance of 1584 maintained this severity, but in 1592 the parliament of Paris decided against the condemnation of neutral ships carrying enemy goods. The smaller northern powers adhered more closely to the principles of the Consolat. In 1438 the senate of Holland decided that neutral property found in the ships of Lubeck and other towns on the Baltic and the Elbe, with which the Hollanders were at war, was not good prize; and this, says Grotius, was thenceforward held to be the law. But Lubeck did not willingly admit it to be the law except when it told in her

[1] 5 Rymer, *Fœdera*, 719. [2] Ib., p. 764.

favour. What Grotius calls *significationes* used to be made by belligerents to neutrals, warning them to break off their trade with their enemies. In 1458 Lubeck refused to obey such a warning from Dantzick, but in 1551 gave one herself to the Hollanders, who were able to refuse obedience without inconsistency[1]. These warnings were of course not limited to the shipment of cargo on board vessels of the enemy. They expressed a natural, though from any legal point of view extravagant, desire, entertained by people who knew well that it is not only commerce in things now called contraband which strengthens a nation, to cut off their enemies from all intercourse with the outside world. The same is true of the efforts which we have seen were made by England to isolate her enemies by warnings to neutrals or treaties with them. But as the shipment of cargo on board vessels of the enemy would be included so far as those efforts succeeded, the warnings, and the treaties so far as they were obtained, are important testimonies to the sentiment on that point[2].

Such was the practice on the continental shores of the Atlantic and Baltic at the time when the *Select Pleas of the Court of Admiralty*, published by the Selden Society under the able editorship of Mr Marsden[3], enable us to speak of the English practice with fuller knowledge. The rule that neutral goods become good prize when carried in an enemy ship was applied in 1545, in a case in which there was no question of contraband, the cargo consisting of satins, girdles, hose and wearing apparel[4]. An order in council of 26 July 1557

[1] Grotius, note to l. 3, c. 1, s. 5.

[2] The examples of the *significationes* and treaties referred to are too numerous for quotation, but a treaty between the Dutch and Lubeck in 1613 may be mentioned, since it is somewhat alien to the spirit commonly shown in the matter by the Dutch. Neither were to aid the enemies of the other with money, troops, ships or victual, or to permit the subjects of the other's enemies to trade in their country: Grotius, u. s. The first clause is based on the doctrine of contraband, but the second is excessive.

[3] Vol. 1, 1892, and vol. 2, 1897; their principal contents being summarised by Mr Marsden both in the introductions to the volumes and in *Six Centuries of the Admiralty Court*, 67 Nautical Magazine, pp. 85, 169, 241, 337, 387, 445, 605.

[4] *Insano c. Elsdon, Select Pleas &c.*, v. 1, pp. 138, 235; v. 2, p. lxvi; 67 N. M. 388. Marsden says of this case that "perhaps the statute of Henry VI was resuscitated as a set-off against the French rule": u. s.,

directed that the maxim *robe d'ennemi confisque robe d'ami* should be applied against Frenchmen in both its branches, because they "put the same in execution against the subjects of this realm." In the same year the council directed that their order just cited should be applied against the Scots, who were also enemies, so as to make a ship taken with goods on board belonging to Scots good prize. After the death of Queen Mary and the peace with France and Scotland no more is heard of any claim on the part of England to condemn neutral ships for carrying enemy's goods[1], and in the closing wars of the sixteenth century the claim to condemn friends' goods captured on board enemy ships was not pressed against our Dutch and French allies, but goods of Venetian (neutral) owners taken in Portuguese (enemy) ships were condemned "according to the exigency of the law and the laws and statutes of this realm of England[2]." After this time, however, the rules of the English admiralty were those of the Consolat, and it is easy to see how the necessity of conforming to the principles of our Dutch allies must have helped to bring about that result, just as we shall see that the necessity of a concordant practice on the part of allies brought about a further change in English practice at the time of the Crimean war.

The seventeenth century was marked by the efforts of the Dutch, in the interest of their carrying trade, to establish the rule "free ships free goods," that is that enemy goods in neutral ships should be free, to which the rule "enemy ships enemy goods," that is that neutral goods in enemy ships should be confiscable, was regarded as a corollary though seldom mentioned in the official documents embodying the

p. 389. This assumes that the statute had fallen into disuse, and that independently of it the English rule was different.

[1] In 1601 an unsuccessful attempt was made by the captors of the *Henri*, a French (friend's) ship carrying Spanish (enemy's) goods, to have her condemned, carrying enemy's goods being alleged to be "against the exigency of right and against the laws and customs of the realm of France passed and promulgated." So the order in council was not relied on. *Six Centuries &c.* 67 N. M. 453; see, for a reference to the record, 2 *Select Pleas &c.* lxxiv, no. 215.

[2] Case of the *St Mark* and other Portuguese ships captured by the *Refusal* and other ships owned by the Earl of Nottingham (lord high admiral) and other Englishmen, *Six Centuries &c.* 67 N. M. 453; see, for references to the records, 2 *Select Pleas &c.* lxxv, no. 155.

former rule. For this system they obtained the assent of a large number of European powers, including not only France but even England, by treaties which the latter power repeated with France and Holland, though not with Spain, at Utrecht in 1713. Such treaties can only bind as between parties one of whom is a belligerent and the other a neutral, and at the commencement of the Seven Years' War in 1756 Great Britain refused to be bound by them towards the Dutch, whom she charged with a refusal to fulfil their contractual obligations of defensive alliance and guarantee. As between belligerents such treaties are abrogated by the war, and although Great Britain has often after wars renewed her stipulations of Utrecht, the last occasion on which she did so was that of her commercial treaty with France in 1786. Thus in her wars she has been practically free to apply the rules of the Consolat, while France, so far as not bound by treaty, repeated her maxim *robe d'ennemi confisque robe d'ami* by her ordinance of 1681, which was relaxed by those of 1744 and 1778.

The Armed Neutralities in which the Baltic powers confederated themselves in 1780 and 1800 adopted the rule "free ships free goods," and the refusal of England to assent to it became one of the chief sources of the charge so widely made against her on the continent of exercising an unjust domination over the sea. At the outbreak of the Crimean war in 1854 the different principles of England and France as to maritime law made it necessary for them to enter into a compromise enabling them to act as allies on a common system, and the terms arranged were the assent of Great Britain to the rule "free ships free goods" without the corollary "enemy ships enemy goods." At the close of the war this compromise received the concurrence of the other great powers of Europe, since extended to almost all the world, in the Declaration of Paris, 16 April 1856, which begins with a preamble amply justified by the history which we have passed in review.

"Considering,' it says, "that maritime law in time of war has long been the subject of deplorable disputes;

"That the uncertainty of the law and of the duties in such a matter gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties and even conflicts;

"That it is consequently advantageous to establish a uniform doctrine on such a point;

"[The signatories] have adopted the following solemn declaration:

"1.

"2. The neutral flag covers enemy's goods, with the exception of contraband of war.

"3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.

"4. "

An agitation was long maintained in England with the view of inducing this country to withdraw from the Declaration of Paris, which it was not within her power to do, that document being really a convention. And had it been possible to do so, the signature of England to the statement in the preamble, that the law was previously uncertain, might have been quoted against any attempt on her part to fall back on the rules of the Consolat as being law in the absence of convention. The United States, which refused to become a party to the Declaration because it did not completely exempt enemy property as such from capture at sea, covered by that refusal the narrower ground of enemy property under a neutral flag; and neither they nor Spain in their war of 1898, nor Japan and Russia in their war of 1904, acted contrary to the Declaration. We may therefore conclude that enemy ships and enemy goods on board them are now, by international law, the only enemy property which, as such, is capturable at sea. That result is the only one conformable to principle, for the assimilation of ships to territory is now sufficiently established to make it no longer possible to ignore the fact that the invasion of a neutral ship, which is not reasonably believed to be offending against any law, is the invasion of a field in which innocent neutral authority is exclusive[1].

In support of the complete exemption of enemy property, as such, from capture at sea a great mass of public opinion is enrolled, and a certain amount of diplomatic success has been obtained. It was adopted by the treaty of 1785 between the

[1] The Declaration of Paris mentions contraband and not blockade as an exception to the rules of immunity which it lays down, because it is only in the former that the question turns on the nature of the goods, and can therefore be assimilated to the question of their being enemy or neutral property.

United States and Prussia, and again by that of commerce in 1828 between the same powers, and by the treaty of commerce between the United States and Italy in 1871; and in 1823 Russia was willing to adopt it on the proposition of the United States, but only on the condition that all other naval powers should join in it. Italy adopted it for herself by her Marine Code in 1865, and in the war of 1866 Prussia, Austria and Italy acted on it. In 1870 Prussia proclaimed it at the beginning of the war, but dropped it when she found that France stood by capture; and the United States continue to carry on a diplomatic propaganda in its favour. On principle we must say that the capture at sea of enemy property as such is a military measure, an operation of war, and that its defence is therefore independent of the mediæval doctrine of the solidarity of sovereigns and states with their subjects, on which the civil courts maintain the doctrines of Non-Intercourse and even perhaps of Confiscation[1]. Its justification must lie in its effect on the fortunes of a war, the consideration of which must be preceded by that of the legal situation of enemy persons at sea.

(B) *Persons: history to* 1907.

The capture of enemy ships always carried with it the right to detain their crews as prisoners. Indeed the doctrine of *courir sus aux ennemis* was from the first as much directed against persons as against things. In the war of 1870 Prussia protested against the detention of North German sailors captured in merchant vessels, as having lost its legal base by the abolition of privateering. The connection of ideas is difficult to see, and France maintained her right. This old practice deprived the enemy of important resources, both of ships which might be available as transports or for purposes of supply, and of men who might render service on board ships so employed or in the fighting navy, and indeed would in general be legally compellable to do so. And thereby the capture of enemy property at sea and that of enemy sailors were connected with one another in a manner peculiarly important to England, of which no soldier and only some sailors consider the invasion to be unthinkable,

[1] See above, pp. 37, 38, as to the backwardness of the civil courts.

and to the invasion of which the rapid collection of a sufficient number of transports and of crews to man them would be indispensable. But the law has received important modifications by the conclusion at the Hague Conference of 1907 of the *Convention relating to certain Restrictions on the Exercise of the Right of Capture in Naval War.* Art. 6 of that convention provides that the *personnel* of a captured enemy merchant ship, being nationals of the enemy state, is to be released on their giving a formal written promise not to engage, while the hostilities last, in any service connected with the operations of the war. By Art. 5, if the *personnel* are of neutral nationality, nearly the same rule applies to the captain and officers, their promise being not to serve during the war on an enemy ship, but the neutral crew go free unconditionally. By Art. 7 the names of the persons freed conditionally under the preceding articles are to be notified to the enemy, who is forbidden knowingly to employ them; and by Art. 8 none of the above provisions apply to ships which take part in the hostilities. Without being unduly depreciatory of the value of written promises given by great masses of men against the interest of their country, it must be admitted that the convention in question has diminished, without however entirely destroying, the security which the capture of enemy merchant ships gave against the collection of the necessary means for an invasion.

(C) *Private Enemy Property at Sea.*

We are now in a position to complete what must be said on the most controverted topic in the international law of the future.

War is not a game or an ordeal, in which two nations meet to determine a difference between them according to certain rules. It is an effort by each of two nations to bend the other to its will, by all the means in its power which do not violate neutral rights and are not ruled out as inhuman. One such means is to isolate its enemy—to cut him off from the comfort and assistance which every group of men derives from intercourse, especially commerce, with their fellow men. Not to mention so obvious an example as blockade, consider what happens when a

country is invaded. Does the invader dream of allowing the population of the part which he has not yet occupied to employ the ports which he has occupied, and the routes across the occupied territory leading to those ports, for the purpose of continuing its commerce with third countries, and bringing back the profits of that commerce to strengthen the enemy government which still maintains itself in the unoccupied part? Whatever may be the precise length to which at the Conference of 1907 it was intended to carry the desire (*vœu*) no. 2 expressed by it[1], common sense assures us that it will not receive so fanciful an interpretation as that. If not, the case of an invader preventing the occupied enemy territory from being made the vehicle for enriching the unoccupied enemy territory, and therefore the enemy government, by commerce, is on all fours with that of captures made by a sea power in order to prevent its enemy from enriching himself by maritime commerce. The latter power has no sovereignty over the sea. True, but neither has an invading power any sovereignty over the occupied territory. Each asserts his physical superiority in a region in which he encounters no neutral right.

Then, as to the arguments specially addressed to the supposed interest of England, the damage arising from the capture of British shipping has never been so great in proportion to her total shipping as that suffered by her enemies in proportion to theirs—it would probably be less in the altered conditions due to steam navigation—it loses through insurance (and this is an argument applicable to all other countries as well as to England) most of its character as a hardship on individuals, and might be still more equitably apportioned among the people if the state accepted the liability for the losses, as was recommended by the Royal Commission on the Supply of Food and Raw Material in Time of War[2]. There does not then seem any sufficient reason why England should promote the immunity of private property

[1] Above, p. 134.

[2] In 1905; Cd. 2643. "We wish to place distinctly on record our opinion that the advantages to be gained from some well considered scheme of the kind [national indemnity against loss from capture by the enemy] seem to us very largely to outweigh any objections which have been stated to us": paragraph 266.

at sea from the burden of military necessity, which lies heavy on private property on land in the shape of requisitions and contributions.

But the subject must not be dismissed without noticing some of the arguments used by advocates of the change. One is that since enemy property is now not capturable, as such, under the neutral flag, while even neutral property under a belligerent flag is still liable to the interruption of its transit by the capture of the ship, the present state of the law would cause the carrying trade to be transferred from England, if a belligerent, to neutral nations. It may be answered that for that purpose it would be necessary to transfer the shipping itself, which French prize law does not allow to be done in time of war, while British prize law is that "the circumstances attending a sale are severely scrutinised, and a transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war[1]." It would therefore be difficult to find on short notice sufficient capital to pay for a safe and wholesale transfer of British shipping, and the delay and expense caused to freighters by ships being brought in for adjudication on the validity of the transfers of them would seriously diminish the supposed advantage to such freighters of entrusting their goods to alleged neutral bottoms. Another argument is derived from the danger to the supply of food and raw material to the British Isles through the capture at sea of enemy property as such. The answer is that the abolition of that capture would almost certainly lead to our supplies of food and raw material being attacked through a straining of the laws of blockade and contraband, and that whether neutral powers resisted such straining would depend chiefly on their political sympathy. Neutrals, however they may complain of unwarrantable interference with their commerce by belligerents, have seldom interfered on that ground as long as they could persuade themselves that the war would be short. Again, some jurists argue that the capture of enemy ships, so far as based on the desire of preventing their and their *personnel* being used

[1] Hall, § 171.

for invasion or for the transport of a force to a seat of war, does not require to be insisted on as a part of the laws of war, because it can always be done when needed for safety by virtue of the necessity which they preach as overriding all laws. My objection to that view of necessity has been stated[1]. If and so long as cases can be foreseen in which the capture and detention in question will be indispensable, the right should in my opinion be preserved as one of the necessities which ought to be provided for in the expression given to the laws of war, and not accepted as an indulgence setting a belligerent free from law. Still another topic urged is that, if enemy ships must be brought in, they ought to be sequestrated and not condemned as prize. If that rule were laid down the situation of private property would be much better at sea than on land, where receipts binding no one to repayment are all that is given for requisitions and contributions. But if the shipowner or cargo-owner, whose trade brings him into contact with the hard facts of war, will not protect himself by insurance, and his own state will not accept any responsibility for his losses, it is ludicrous to expect that the enemy state will show such care for him.

The Conference of 1907 was of course a field of battle for those who attack the existing system with regard to private enemy property at sea, either radically or only desiring some modification of it, and as being more interesting than any single opinion I will notice the proposals made at the Conference in the order in which they were radical.

First in that order, as most radical, stands the proposal made by Mr Choate in the name of the United States, that all private property shall be exempt from capture at sea except under the laws of contraband and blockade, an exception which may here be stated once for all as made, expressly or tacitly, in all the proposals for immunity brought forward at the Conference. This proposal received during the discussion the assent in general terms of the German and Swedish delegates, the former however, the Baron Marschall von Bieberstein, declaring that in the opinion of his government the laws of contraband and blockade ought to be first settled, and the latter, M. Hammarskjöld, admitting that there would be difficulties in the

[1] See above, pp. 123–125.

application of the principle. The Danish delegation declared that their government was ready to recognise the principle of the inviolability of private property at sea if it should obtain the approbation of the Conference, but that if the time had not arrived for realising that humane idea by common accord, they would assist in the adoption of measures tending to limit the inconvenience of the existing practice. On the other hand the delegates of Colombia and Argentina maintained the capture of enemy property, as such, as necessary for the defence of powers weaker at sea[1].

Next in order come the proposals for a modification of the right of capture made in the names of Belgium and Brazil. The first clause of the Belgian proposal laid down that enemy merchantmen and enemy goods under the enemy flag can be captured and retained by a belligerent only subject to their restitution at the end of the war. Other clauses gave him the right to use the ships and cargoes for military purposes, to sell the ships when their repair or their keep would be out of proportion to their value, and to sell the cargoes if perishable; also he might destroy the ships if the circumstances or the approach of an enemy force prevented his carrying them *intra præsidia*. At the end of hostilities the property remaining in kind, the value of that destroyed, and the sale monies were to be restored to the owners by the captor's state, without any indemnity for deprivation of enjoyment, or for deterioration not caused by grave fault; but that state might shift the burden to the enemy state by the treaty of peace. The crews of the captured ships were to be disembarked as soon as circumstances permitted, and set free on their engagement not to serve against the captor's state during the war, which engagement was to be respected by their own government. The Brazilian proposal empowered a captor to destroy or take an enemy merchantman or all or any part of her cargo, even

[1] A passage in the speech of the Colombian delegate M. Triana is worth quoting for the reply which it makes to the misuse of historical argument. "*M. Choate,*" he is reported to have said, "*nous a dit que le droit actuel est un héritage de l'ancienne piraterie. C'est vrai, comme il est vrai que la guerre n'est que le meurtre organisé. Nous ne gardons ces droits que pour le moment où la normalité aura cessé.*"

neutral cargo if the ship is taken, "when commanded to do so by the most imperious exigencies of war," on giving to the captain receipts as for requisitions, "with all possible details for ensuring to the interested parties their right to a just indemnity." Since the receipts which the Hague laws of land war, even as amended in 1907, require to be given for requisitions neither express nor involve a liability of any one[1], while it must be very difficult to put any real bounds to a plea of imperious exigency, this proposal, considered with regard to enemy property, was far more favourable to the captor's state than the Belgian one. Considered with regard to neutral cargo, which under it might be requisitioned without destroying the ship, it was contrary to the Declaration of Paris. But in another respect the Brazilian proposal was very favourable to the captured and their state, since it provided for the crew of the ship destroyed or taken being put on shore in a neighbouring port, "with the resources necessary for their return to their country," but did not provide for their not serving against the captor's state. There was also a proposal made by the Netherlands delegation, to the effect that the captor should set free those enemy merchantmen which he did not desire to use for military purposes, delivering to them a passport in which it should be declared that the enemy is not to use them for such purposes.

At the opposite extreme to the United States proposal among those submitted was the French one, which was as follows.

Considering that if the positive law of nations still admits the legitimacy of the right of capture applied to private enemy property at sea, it is eminently desirable that, until an understanding as to its suppression can be arrived at between states, its exercise should be subjected to certain regulations (*modalités*):

Considering that it is most important that, conformably to the modern conception of war which ought to be directed against states and not against individuals, the right of prize should appear solely as a means of coercion practised by one state against another:

That in that order of ideas all individual profit to the agents of the state who exercise the right of prize ought to be excluded, and that the

[1] See above, pp. 109, 110.

losses incurred by individuals through captures ought to fall in the last resort on their state:

The French delegation has the honour to propose to the fourth committee that it should express the desire (*vœu*) that states which shall exercise the right of capture should suppress the shares of prize money assigned to the crews of the capturing ships, and should take the measures necessary in order that the losses caused by the exercise of the right of capture may not fall entirely on the individuals whose property has been captured.

A vote being taken in the fourth committee on the United States proposal, it received the voices of the 21 states which follow in the alphabetical order of their English names: Austria-Hungary, Belgium, Brazil, China, Cuba, Denmark, Ecuador, Germany (with reservations), Greece, Haiti, Italy, Netherlands, Norway, Persia, San Domingo, Siam, Sweden, Switzerland, Turkey, United States, Uruguay. It will be observed that the states which had made intermediate proposals, except France, testified by their votes that they had done so only in the hope of conciliation. The following 11 states voted against the United States proposal: Colombia, France, Great Britain, Japan, Mexico, Montenegro, Panama, Portugal, Russia, Salvador, Spain. It is superfluous to name the states which took no part in the vote. It was then decided to consider the intermediate or subsidiary proposals, in order that the commission, before reporting, might discover whether a majority more nearly approaching unanimity could be reached. The first vote taken in pursuance of that decision was on a clause of the Brazilian proposal, by which the words "apart from cases governed by maritime law" were to be omitted from Art. LIII of the Hague laws of land war[1], as a step towards bringing naval capture under the principle of requisitions. This clause was rejected by 13 votes against 12, and the Brazilian proposal was thereupon withdrawn. The next vote taken was on the first clause of the Belgian proposal[2], and gave a majority of 14 to 9 in its favour; but the first Belgian delegate, M. Beernaert, thus finding that the opposition of the powers which sided with Great Britain for the maintenance of the present law was not broken, withdrew the whole proposal.

[1] See above, p. 113.

[2] See above, p. 151.

On a later occasion the French proposal was considered by the same committee, and the first part of it was adopted by 16 votes against 4 negative ones and 14 abstentions, after having been modified, in deference to the objection that prize money belonged to national and not to international legislation, by substituting, for the *vœu* originally expressed, an invitation to the powers which should maintain capture to consider the means of abolishing that reward. The second part, pointing to some indemnity to the persons whose property is captured, was defeated. There were 7 votes in its favour, among which was that of a British delegate, Sir Ernest Satow, against 13 negative ones and 14 abstentions.

The proceedings in committee do not seem to have been carried further with express reference to private enemy property at sea, but the Conference, at a full sitting, unanimously expressed its desire (*vœu*, no. 4) that the preparation of regulations relating to the laws and customs of naval war should figure in the programme of the next Conference, and that in all cases the powers should apply, as far as possible, to war by sea the principles of the Convention relating to the Laws and Customs of War on Land.

Droits of admiralty. The rules relating to the capture of private property at sea are equally applied by the states which maintain such capture to the seizure for the state of private property arriving in their ports during a war. In England the case is comprised in the "droits of admiralty" together with property in port at the outbreak of war.

Exceptions to the Capture of Enemy Property at Sea.

Personal Effects. Whether from a feeling of humanity, or because personal effects are not within the justificatory reasons for the existing practice of naval war, although they were included in the original doctrine of *courir sus*, the personal effects of the captain and crew of a captured ship are not condemned as prize. And the same favour is extended, so long as the parcels are really small, to small parcels of merchandise being the "adventures," *pacotilles* in French, which it has been customary

to allow captains to make on their own account[1]. Passengers would no doubt enjoy the same immunity for their personal effects, but even supposing them to enjoy an immunity for their adventures, the question of degree arising in the case of an adventure might be less easily decided in their favour than in the case of the captain, since there would be nothing but the degree to distinguish them from merchants.

Coast Fisheries. Immunity from capture on the ground of their being enemies or enemy property, but not from capture and condemnation on the ground of breach of blockade, is enjoyed by the men, boats and tackle employed in coast fisheries, and their cargoes of fresh fish, including fish kept alive by contrivances on their way to market; so long as the men and boats are not engaged in any warlike employment—in which scouting, exchanging signals with the forces on their side, and carrying arms would be included—so long also as in the opinion of the hostile government or its naval commanders concerned they are not likely to be engaged in any warlike employment. If the opinion here referred to is only that of the naval commanders concerned, the prize court before which the captures are brought will have to release them unless the warlike intention of the captured is proved to its satisfaction; but if the captures were made in pursuance of a government order, the prize court, in the absence of any thing to the contrary in the constitution of the country, will be bound by such an order as emanating from the authority under which it sits. To this statement, which appears to be sufficient as regards the duties of prize courts and commanders, it must be added that a government is not entitled to issue orders interfering with the coast fisheries of its enemy state, unless as an inseparable part of a military operation, or when it has good reason to expect that that state will make

[1] Example. *Les effets, hardes, instruments nautiques et cartes, ainsi que les* 2000 *noix de coco réclamées par le capitaine Holtz, sont restitués à ce marin dans l'état où ils se trouvent et sans frais, à titre de pacotille personnelle.* Sentence on the *Joan*, in *Jurisprudence du Conseil des Prises pendant la guerre de* 1870–71, Henri Barboux, p. 106. In *The Friendship*, on prayer that the master's adventure might be restored, Lord Stowell said: "I shall leave him to the mercy of the captors. He is a man who has not made an ingenuous disclosure of the facts in his possession": 6 C. Rob. 429.

a warlike use of the men or boats. The history of the immunity and the authorities on it were so fully treated by Mr Justice Gray in delivering the opinion of the majority of the Supreme Court of the United States in the case of *The Paquete Habana and the Lola*, 1899, 175 U.S. 677, that a general reference to that judgment may dispense with a multitude of particular references which would otherwise be necessary[1].

The coast fisheries which enjoy the immunity thus described are contrasted with what is called the great fishery, such as that for cod, right or sperm whale, seal or sea calf; indeed England, in the correspondence carried on with the French government through M. Otto, the French commissioner resident at London for the exchange of prisoners, declared, with regard to the order in council of 16 March 1801, that the concession was never extended to the great fishery or to commerce in oysters or in

[1] The vessels in question in the case mentioned were Spanish fishing boats, of 25 and 35 tons respectively, captured off the coast of Cuba during the Spanish-American war and released by the court. On two of the points incorporated in the statement in the text, blockade and probability of warlike employment, we may quote the answer which the United States Secretary of State, Mr Day, made on 30 April 1898 to Admiral Sampson, who had recommended that the Spanish fishermen should be detained as prisoners of war. He said: "Spanish fishing vessels attempting to violate blockade are subject, with crew, to capture, and any such vessel or crew considered likely to aid enemy may be detained." Cited by Mr Justice Gray, p. 713, from the *Bureau of Navigation Report of* 1898, appendix, 178. On this it may be remarked that the authority so given by the government, for the case of the admiral's thinking warlike employment probable, was only to detain, and would not have bound the Supreme Court to condemn even if the constitutional relation of that court to the executive government had been the same as that of a British prize court to the crown.— Another point incorporated in the statement in the text is the mention of fresh fish in defining the immunity. This was expressly contained in the French regulations of 1779 and 1780, with the addition "even if not caught by the vessels" which should claim the immunity, so as to cover vessels employed in carrying the fish home: *Paquete* &c., p. 690. And the British orders in council of 23 May 1806 and 2 May 1810 described the immunity as belonging to "vessels employed in catching and conveying fish fresh to market," where "and" evidently ought to be read "or," the latter order adding, "such vessels not being fitted or provided for the curing of fish": 5 C. Rob. 408 and Edw. Adm. appendix L. In the cases of the *Paquete Habana* and *Lola* the fish were kept alive by contrivances: p. 718.

fish[1]. On the other hand it is not limited to vessels fishing off the coast of their own country, for the Spanish boat *Lola*, which was declared by the Supreme Court of the United States to be entitled to it, had been fishing on the coast of Yucatan. The condition that the fish must be brought to market alive appears to supply the necessary distinction.

The immunity of which we are treating was known in the middle ages: Froissart says that "fishermen on the sea, whatever war there were between France and England, never did harm to one another, so they are friends and help one another at need[2]." Of course it could not then have existed in the precise shape which can now be given to it, the whole subject of naval war was still so confused even in theory—in particular blockade had not emerged as a distinct branch of it—and the times were too disorderly for practice to follow closely such theory as was possible. We can indeed perceive that the practical enjoyment of the immunity mainly depended on edicts and treaties, sometimes limited in their terms[3]. Indeed this is confessed in Art. 49 of the French *Ordonnance* of 1543 and Art. 79 of that of 1584, which Cleiron reproduces as Art. 80 of his *Jurisdiction de la Marine*, namely that "the admiral may in time of war grant fishing truces to the enemy and his subjects, provided the enemy will likewise grant them to Frenchmen." The ordinance of 1681 did not repeat this article, and that of 1692 declared fishing vessels to be good prize, the enemies of France being accused of not observing the agreements. But France expressly restored the indemnity during the War of American Independence, and in the same war England acted in the same sense; and from that time prize courts have not waited for it to be expressly given, but have allowed it whenever it has not been withheld by government orders[4]. It was so withheld by England at the

[1] Martens, *Recueil*, 2 *Suppl.* 295.

[2] Vol. 3, c. 41, p. 133, of the edition of 1574.

[3] English orders of 1403 and 1406, at which dates there were hostilities between England and France notwithstanding the 28 years' truce of 1396; the order of 1403 with geographical limits. Agreement of 1521 between Francis I and Charles V, then at war with one another, limited in time. French and Dutch edicts in favour of the herring fishery in 1536. Agreement of 1675 between Louis XIV and the States General.

[4] By an order of 11 April 1780 Sir James Marriott, judge of the Court of

commencement of the War of the French Revolution, and again in 1798 and 1800, on which latter occasions there was serious fear of a French invasion, for which fishermen and their boats might have been very helpful, so that those occasions fall within the true measure of the rule as I have stated it. The danger having disappeared, the orders against French fishermen were revoked in 1801[1].

Another historical fact calls for an accurate appreciation of the rule, which, as I have stated it, is not one for a general immunity of coast fisheries, but for their immunity from capture on the ground of enemy character, and therefore does not entitle them to stand in the way of and prevent or frustrate a military operation, which is what private property on land is not allowed to do. Their want of immunity for breach of blockade, for which we have seen authority from a source generally favourable to them, is a particular instance of that principle. The fact to which we refer is what took place in the sea of Azof during the Crimean war, when the instructions of the British admiral were "to clear the seaboard of all fish stores, all fisheries and mills, on a scale beyond the wants of the neighbouring population, and indeed of all things destined to contribute to the maintenance of the enemy's army in the Crimea." Thereupon the British and French ships in cooperation "destroyed large fishing establishments and storehouses of the Russian government, numbers of heavy launches, and enormous quantities of nets and gear, salted fish, corn and other provisions intended for the supply of the Russian army[2]." It may well be believed that private property of fishermen was involved in such an operation, and that it would have been impossible to carry the instructions into effect, purely military as their purport was,

Admiralty, provided for the consolidation of causes of prize of small fishing boats, but occasion cannot have arisen for putting that order in exercise, or at least condemnation cannot have ensued under it, as England in that war abstained from interfering with the coast fisheries.

[1] In 1800 the British government complained that French fishing boats had been made into fireboats at Flushing, and that the French government had impressed fishermen and their boats, even those whom the British had released on condition of their not serving, and sent them to Brest to serve in the flotilla.

[2] United Service Journal, 1855, part 3, pp. 108–112.

consistently with the scrupulous sparing of private property. The French instructions to naval commanders, as well during the wars of 1859 and 1870 as during the Crimean war, forbade them to trouble the coast fisheries or to seize any vessel or boat engaged therein, unless naval or military operations should make it necessary. Those of 1854 required the commanders, in case of operations in the White Sea, to spare the trade in fresh fish, provisions, utensils and fishing tackle between the country people of the Russian coast and the Norwegian fishermen from Finmark, except in case of abuse[1].

We can now deal with the question whether the immunity of coast fisheries is a rule of international law, properly so called. The answer depends in part on the meaning with which the word "law" is used in the question, and in part on the terms in which the immunity is stated. If stated too largely it is either not a rule of law in any sense, or it is one subject to that violation from necessity which, as I so often urge, is to my thinking the negation of legal principle. If stated as I have stated it, it appears to have arrived in the course of centuries at satisfying the conditions which we regard as those of international law in the only true sense, namely that the conscience of our international society demands it and that it is observed. When the Addington ministry in 1801, revoking the order of 1800, declared that "the freedom of fishing was nowise founded upon an agreement but upon a simple concession," which "would be always subordinate to the convenience of the moment," they probably intended to rate the obligatory character of the concession lower than we must rate it after the further practice of a century. Nor need we be led to an opposite opinion by what Lord Stowell said: "in former wars it has not been usual to make captures of these small fishing vessels, but this was a rule of comity only and not of legal decision; it has prevailed from views of mutual accommodation between neighbouring countries, and from tenderness to a poor and industrious order of people.... As they are brought before me for my judgment they must be referred to the general principle of this court; they fall under the character and description of ships constantly and exclusively

[1] 2 Ortolan, App. Sp. VI.

employed in the enemy's trade[1]." The same remark occurs on the effect of practice since continued; we may not feel sure as to the sense which that great judge attached to comity; and we may remember the extreme sensitiveness which he always showed about his position relatively to the government. To condemn as the inevitable result of the government's having allowed the case to come before him was more congenial to his habit of mind than to recognise that the immunity invoked depended for a prize court on the government's not withholding it.

The Hague *Convention* of 1907 *relating to certain Restrictions on the Exercise of the Right of Capture in Naval War* is expressed, as to the subject before us, in terms which, allowing for their brevity, agree with the doctrine here delivered.

> Art. 1. Boats employed exclusively in coast fisheries or in local coast navigation are exempt from capture, as well as their tackle, rigging, gear and cargoes.
>
> This exemption ceases as soon as they participate in any manner in hostilities.
>
> The contracting powers oblige themselves not to profit by the inoffensive character of such boats, by employing them with a warlike purpose while preserving their peaceful appearance.

It may be assumed, when it is said that the exemption of coast fishing boats ceases as soon as they participate in hostilities, that this does not mean that no particular boat can lose the immunity without having itself so participated, but that the immunity may be withdrawn from the class on any part of the enemy's coast, when he there employs them or the fishermen with a warlike purpose.

Science, Art &c. Expeditions despatched for purposes of science, religion or humanity have long enjoyed an immunity from interference on the ground of enemy character, so long as they observe all the duties of neutrality and engage in no commerce not necessary for the object of the expedition. This is now secured to them by Art. 2 of the convention last quoted. When starting for localities where communication with the civilised world may be for long impossible, they have often been furnished by friendly governments with safe-conducts in advance, as in the cases of Bougainville in 1766, La Pérouse

[1] *The Young Jacob and Johanna*, 1 C. Rob. 20.

in 1785, the expeditions in search of Sir John Franklin, and that of Nordenskiöld in the *Vega*. The latter examples show that the privilege is not confined to public expeditions, but full information would be required by any government asked for a safe-conduct, and any departure from the particulars so communicated might entail serious consequences by reason of the suspicions excited[1].

Works of art or learning belonging to the state or to public institutions were at one time regarded as proper spoils of the victor, when they were not protected by the mutual courtesy of sovereigns, who were then considered as the owners of what we now say belongs to their state. We have seen that H LVI at last protects them on land, and they had already been pronounced exempt from maritime capture by two remarkable judgments. One was that of the vice-admiralty court of Nova Scotia restoring paintings and engravings, taken by a British ship in 1813, to the Academy of Arts at Philadelphia; the other was that of the United States court in 1861, restoring cases of books to a university in the insurgent state of North Carolina[2]. Works of art or learning belonging to private individuals enjoy no immunity. The concession is made to the public ends promoted by the body which profits by it.

Licenses. A state may forego its rights by licensing trade with the enemy. The effect when an enemy is interested in such a license is to convert him into a friend to the extent of its conditions, so that he can insure his property and enforce the contract of insurance by suit in the name of an agent, and when his property is at sea it will not be capturable, and will be subject to his right of stoppage *in transitu*[3]. A commander, as such, may regulate trade within the district of which he is in military occupation, but only the supreme power can grant such a license for oversea trade as to exempt it from capture.

[1] See particularly 2 Kleen, *Neutralité*, 503–5—who cites the Japanese prize law of 9 Sep. 1894 as enumerating the purposes of religion and humanity along with those of science—and Lawrence, § 205.

[2] *The Marquis de Somarveles*, Stewart Adm. (Nova Scotia) 445, 482; *The Amelia*, 4 Philadelphia 417. As to land war see above, p. 117.

[3] See *Flindt v. Scott* and the cases cited in it: 5 Taunton 674, Scott 526. As to whether a suit can be brought on the insurance in the enemy's name, see the note on ransom bills, below, p. 181.

The French instructions of 25 July 1870 gave to enemy ships entering French ports in ignorance of the war thirty days for departure. This was held to leave confiscable the enemy's cargoes on board such ships, the only express mention of cargoes in the instructions being of those loaded for France and for French account before the declaration of war[1].

Cartel ships, as those are called which are employed in the exchange of prisoners or on other special services under agreement between the belligerents, are licensed for themselves and any merchandise which they carry by express permission, but not for any goods carried in excess of the permission[2]. And if the permission is grossly exceeded, the ship herself will be confiscated[3]. All contracts entered into for equipping and fitting a cartel ship for her service are considered as made between friends, and may be enforced in the courts of either belligerent having jurisdiction in the case[4].

Shipwreck or Peril of the Sea. Enemy ships entering the harbours of a state after the outbreak of war are liable to capture as if they were still at sea, with such exceptions as are made when declaring war or by the Hague convention for ships then on their voyage (above, pp. 42, 43). Enemy ships wrecked on the coast have not been placed by international consent under any different rule, and their liability to capture is affirmed by French ordinances and practice[5], but the Institute of International Law has recommended that an immunity should be granted to vessels of the mercantile marine compelled by an accident of *force majeure* to take refuge in an enemy port[6]. Humanity seems to dictate this, especially when it is considered that a ship which might have found a refuge in an enemy port may otherwise be lost in trying to reach a home or a neutral one.

[1] *La Ghérardine*, Barboux, p. 60. But now see above, p. 43, as to merchantships entering an enemy's port in ignorance of the war.

[2] *The Carolina*, 6 C. Rob. 336.

[3] *The Venus*, 4 C. Rob. 355.

[4] *Crawford v. The William Penn*; Peters, Circuit Court, 106; Scott 580, 584.

[5] Despagnet, § 655.

[6] 17 *Annuaire* 284.

Criterions of Enemy Character.

Nationality, Domicile, House of Business[1]. In France and generally on the European continent the same character is attributed to a shipowner or cargo-owner for the purpose of maritime capture as for other purposes. He is an enemy or a neutral according to his political nationality[2]. But the French Instructions of 25 July 1870 to naval commanders, Art. 10, say that "for the application of the principles that the neutral flag covers enemy goods and that neutral goods are free under the enemy flag, contraband of war excepted, the nationality of houses of business [*maisons de commerce*] must be determined according to the place where they are established[3]." This seems to have been intended to apply to the enemy or neutral character of cargoes only, for the same article proceeds: "the nationality of ships does not result only from that of their owners, but also from their legitimate right to the flag which covers them," so that in the case of ships no mention is made of a house of business. So far as it goes, the rule of the Instructions was an innovation no doubt suggested by the Anglo-American doctrine presently to be mentioned; but Despagnet, § 651, says that the traditional jurisprudence of the French prize courts has not been modified by it, in support of which statement he quotes *The Joan*, Barboux, p. 104. In that case the court took occasion to reassert the old doctrine in strong terms[4], but the goods condemned were consigned to two Germans in neutral territory, *commanditaires of a Hamburg house of business*, so that the Instructions were not violated.

[1] The conference which issued the Declaration of London was unable to agree on "the question whether the nationality or the domicile of the owner should be adopted as the dominant factor in deciding whether property is enemy property" (so put in the British programme of that conference). The discussion which here follows consequently retains its actuality.

[2] *Le Hardy c. La Voltigeante*, 1 Pistoye et Duverdy 321.

[3] Barboux, p. 140.

[4] "Considering that Schräder and Böminger are both of German origin, and that in principle one does not cease to belong to a country because one resides in another with the object of trading in it; considering that in order to cease to belong to one's country one must have renounced it by the adoption of a new country, that is by naturalisation;" &c.

The Anglo-American system makes the enemy or neutral character of an individual, so far as it is important for the purpose of maritime capture, depend, not on his political nationality, but on his domicile in a peculiar sense known as trade domicile in war. At the same time it upholds the importance of the fact that a house of business is established in the enemy's country. Both these branches of the doctrine are defended on the ground that trade, whether industrial or commercial, is a source of wealth and therefore of strength to the country in which it is carried on, by the money spent there and the liability of the profits to taxation. It is not forgotten that it may also benefit another country in which the person to whom the trade or a share of it belongs is resident, and to which he may cause the profit or his share of it to be brought. And the combination of these points of view has led to a state of the authorities which is thus characterised by Wheaton. "Residence," he says, "in a neutral country will not protect [a merchant's] share in a house established in the enemy's country, though residence in the enemy's country will condemn his share in a house established in a neutral country. It is impossible not to see in this want of reciprocity strong marks of the partiality towards the interests of captors, which is perhaps inseparable from a prize code framed by judicial legislation in a belligerent country, and adopted to encourage its naval exertions[1]."

Without having or being a partner in a house of business established in a given country, a man may in that country make

[1] *Elements*, § 335 in Dana's numbering. In *The Antonia Johanna*, 1 Wheat. 159, it was held that the share of a partner in a neutral house is subject to confiscation when his own domicile is in a hostile country. And in *The Friendschaft* (*sic*), 4 Wheat. 105, it was held, following the opinion expressed by Lord Stowell in *The Portland*, 3 C. Rob. 44, 45, that the property of a house of trade established in the enemy's country is condemnable as prize, whatever may be the personal domicile of the partners. In *The Venus* Chief Justice Marshall, from whose judgment Wheaton was quoting almost literally in the passage in the text, said that it was impossible to consider Lord Stowell's judgments attentively without perceiving that his mind leant strongly in favour of captors; at the same time he called him a truly great man, and acknowledged that he showed no disposition to press his principles with peculiar severity against neutrals, as he certainly did not mitigate them when applying them to British subjects. 8 Cranch 299.

contracts or do other acts of a trader, not linked together otherwise than through his person. Then we have the state of facts with regard to which Lord Stowell said that "a man may have mercantile concerns in two countries, and if he acts as a merchant of both he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries[1]." And no greater extent, with regard to the rule now occupying us, can be given to what was said by Lord Lindley; "The subject of a state at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy. The validity of his contracts does not depend on his nationality, nor even on what is his real domicile, but on the place or places in which he carries on his business or businesses[2]."

What Lord Lindley here contrasts with real domicile is "trade domicile in war," and we have to account for the term "domicile" being used at all in connection with it. In the early times of admiralty law domicile was a familiar conception for the classification of persons, while the conception of nationality has only since been perfected along with that of the modern state. Hence admiralty judges used it as determining the enemy or neutral character of persons before they had any intention of building on the benefit derived to a given country by trade, and we may suppose that in England they were confirmed in that habit by the circumstance that prize causes here were usually assigned to the same persons who were judges in probate and matrimonial matters, in which the reference to domicile was constant and fundamental[3]. In later times the idea of the trader's place of residence being benefited by his trade came in to strengthen the connection, and has prevented domicile as referred to for war from following the development which domicile in its proper sense has undergone. For the former, as we have seen

[1] In *The Jonge Klassina*, 5 C. Rob. 302.

[2] In *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 505, 506. He referred to *Wells v. Williams*, 1 Raym. 282, 1 Salk. 46, in which case it was held by Treby, C. J., that "an alien enemy who is here in protection may [in his own name] sue his bond or contract, but an alien enemy abiding in his own country cannot sue here. And *Dier*, 2 b, pl. 8, and the other books ought to be understood so."

[3] See Part I. of this work—*Peace*—2nd ed., p. 212, and above, p. 54.

in the language quoted from Lord Stowell, still freely admits multiplicity as possible, which was the original character of all domicile, its importance in Roman law being limited to questions of jurisdiction and municipal burdens, of which there was no legal objection to a person's being subject to several. But when domicile became a criterion of law, as it now is in England for the age of majority and the intrinsic validity of a will of movable property, it was necessary in civil courts to assert its unity, and along with that necessity there has arisen in England a greater strictness in appreciating the residence necessary for its acquisition. The present English doctrine on that subject is that in order to acquire a domicile of choice in any country a person must intend to reside there in the most permanent manner, or reason must be shown for thinking that he would have formed such an intention if his thoughts had been crystallised by the question being put to him[1]. But the utility to a country of the industry or commerce carried on in it depends on the actual seat of the occupation, and not on its probable continuance.

Hence our great admiralty judges have not taken a very strict view of the residence necessary for acquiring a trade domicile in war. "Time," said Lord Stowell, "is the grand ingredient in constituting domicile. I think that hardly enough is attributed to its effects. In most cases it is unavoidably conclusive. It is not unfrequently said that if a person comes only for a special purpose, *that* shall not fix a domicile. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy....[Domicile] is to be taken in a compound ratio of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen but with few exceptions that mere length of time shall not constitute a domicile[2]." This doctrine he applied as well to residence in the British dominions as to residence in the enemy country, the effect in the former case being that a trade domicile

[1] See Westlake, *Private International Law*, 5th ed., pp. 362, 366. A domicile of choice is contrasted with the domicile of origin, usually that of the person's father, which is attributed to every one in order that no one may be without a domicile.

[2] In *The Harmony*, 2 C. Rob. 324, 325.

in British territory brought the merchants having it under the British rule prohibiting trade with the enemy, and thereby exposed their property to capture no less, though for another reason, than if their trade domicile had been in enemy territory. He admitted a relaxation of the doctrine in favour of a person whom the outbreak of war surprises with a trade domicile in a foreign country, when by the date of the capture he has "put himself in motion, *bona fide*, to quit the country *sine animo revertendi*": then the commencement of his journey is equivalent to his arrival in his own country. But the majority of the Supreme Court of the United States, with the express concurrence of Justice Story though he did not sit in the case, refused to carry the relaxation further, and condemned the property of American citizens who had been caught by the outbreak of war in 1812 with a trade domicile in England, notwithstanding their manifestation, without practical effect, of a desire to return to America[1]. Chief Justice Marshall dissented, holding that when a merchant establishes himself for trade in a foreign country, his intention is presumably to carry on that trade only so long as he can do so without violating his duty to his own country, which is no longer possible after a war has arisen between the two. "A continuance of trade after the war, unless perhaps under very special circumstances and for the mere purpose of closing transactions already commenced, would fix the national character and the domicile previously acquired. An immediate discontinuance of trade and arrangements for removing, followed by actual removal within a reasonable time, unless detained by causes which might sufficiently account for not removing, would fix the intention to change the domicile[2]," and should exempt the property from condemnation. And Lord Kingsdown must be reckoned as agreeing with the eminent chief justice, for he said, in delivering the judgment of the privy council in *The Gerasimo*, that "if a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country[3]."

[1] *The Venus*, 8 Cranch 253. [2] 8 Cranch 315.

[3] 11 Moore P. C. 96. The dictum was not necessary for the decision of the case.

The determination of the enemy or neutral character of a house of business by its situation, or of a person by his trade domicile in war, leads to a question about the character of the territory where such situation or domicile exists, as being affected or not by events which have taken place in the course of the war. This was discussed at some length in the case of *The Gerasimo*[1], with reference to Moldavia, a friendly country which during the Crimean war was occupied by Russia: Dr Lushington deemed it to have acquired the enemy character, but he was reversed by the Judicial Committee, the judgment of which was pronounced by Lord Kingsdown. "What," they said, "are the circumstances necessary to convert friendly or neutral territory into enemy's territory? For this purpose is it sufficient that the territory in question should be occupied by a hostile force, and subjected during its occupation to the control of the hostile power, so far as such power may think fit to exercise control, or is it necessary that, either by cession or conquest or some other means, it should either permanently or temporarily be incorporated with and form part of the dominions of the invader at the time when the question of national character arises?" The answer must be the same as for the conversion of enemy's territory into friendly or neutral, and, for choosing the second of the alternatives which they put, their lordships had the precedents of the French possessions in the island of St Domingo, which the lords of appeal in the cases of *The Dart* and *The Happy Couple*, in 1808, treated as still French although the insurgent negroes had established a government in them[2]—the Spanish ports in French occupation during the Peninsular war, which Lord Stowell considered would have to be deemed friendly[3]—and the Ionian Islands, which were held to be still distinct from Russia during the Russian occupation of them before the treaty of Tilsit[4], but to have become hostile after Russia had delivered

[1] 11 Moore P. C. 88.

[2] Related in *The Manilla*, Edw. 3.

[3] In *The Santa Anna*, Edw. 182.

[4] *Donaldson v. Thompson*, 1 Camp. 429. Hamburg was similarly held not to have become hostile by the French occupation of it before its annexation to the Napoleonic empire: *Hagedorn v. Bell*, 1 M. and S. 450.

them to France in 1807 by a voluntary transaction which was deemed to be equivalent to a cession by treaty. But although an old right to territory will be held to remain in force for the present purpose notwithstanding the temporary loss of its fruition, a new right will not for the same purpose change the character of territory till it has been followed by fruition. Spain ceded Louisiana to France in 1796, but France, not having the command of the sea, could not take possession, and a Louisianian ship captured by a British privateer was released as being Spanish and friendly. But the Danish island of Santa Cruz, having fallen under British possession during a war between England and Denmark, was classed by Chief Justice Marshall with "acquisitions made during war," so as to have become British "to every commercial and belligerent purpose" of a war between England and the United States[1].

Lastly, if a person of European or American blood has a trade domicile or a house of business in an Eastern country under the protection of his consul, that is considered as a trade domicile or a house of business in his own country[2]. And a person having a trade domicile in any enemy country will not the less have the enemy character because he is consul there for his own neutral country[3].

Enemy Character of Ships. If a ship sails under the enemy flag, the character which her owner or any of her partowners may have as individuals is immaterial. By accepting the flag they have placed themselves under its protection: if that fails them she may be captured and will be condemned, and no share which a friend may have in her will be saved[4]. A mortgage or

[1] *Thirty Hogsheads of Sugar (Bentzon claimant) v. Boyle,* 9 Cranch 191, 195.

[2] Wheaton, *Elements,* § 333, Dana's numbering.

[3] *The Baltica,* Spinks P. C. 264.

[4] The Dutch colony of the Cape having fallen into British possession during the voyage, but before the capture, of a ship belonging to Cape merchants and bound from Batavia for Holland, Lord Stowell condemned her: *The Danckebaar Afrikaan,* 1 C. Rob. 107. This has been objected to by Hall, § 173, on the ground that the owners had lost their enemy character before the capture, but may be defended on the ground that the ship was still under the Dutch flag, by the protection of which she hoped to reach Holland. But the Swiss-owned ship *Palme,* sailing under the

lien on a ship sailing under the enemy's flag, whether it arises by contract or by law as a factor's lien—unless it is a general law of the mercantile world, as that which gives the lien of freight—is treated as a part interest in the ship and is not saved from the condemnation[1].

The rule just stated with regard to mortgages and liens applies in England and the United States to cargoes as well as to ships, on the broad ground, stated by Lord Stowell, that "captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding between other parties which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure." To which he added that it would be equally impossible for the court to decide on the question of property, because it could not know perfectly the laws of the different countries on which the interests claimed might depend[2]. These reasons can scarcely be deemed satisfactory, but the doctrine supported by them has been applied in numerous cases, in some of which the reasons have been eked out in a manner not more satisfactory by the assertion that, were it otherwise, *bona fide* neutral mortgagees could be found so easily that there would be an end of all prize condemnation[3].

The rule which forfeits the share or interest of a neutral in an enemy ship is sometimes presented as being one that a ship is in prize law an indivisible whole, but it does not avail in the Anglo-American system to free the share or interest of an enemy in a neutral ship from capture. Such share or interest

North-German flag, was released by the French *conseil d'état* on the ground that Switzerland does not allow its citizens to carry the Swiss flag at sea : 4 Holtzendorff's *Handbuch* 584.

[1] See, for France, *Le Turner*, 22 Dec. 1870, Barboux 75, in which the claim of the neutral mortgagee of a condemned ship was refused.

[2] *The Marianna*, 6 C. Rob. 25, 26.

[3] Miller, J., in *The Hampton*, 5 Wallace 374. In this case and *The Tobago*, 5 C. Rob. 218, and *The Battle*, 6 Wallace 498, the question arose about ships. In *The Marianna*, and *The Frances*, 8 Cranch 418, *The Ida*, Spinks Pr. Ca. 26, and *The Carlos v. Roses*, 177 U. S. 655, it arose about cargoes.

will be confiscable, as we have seen is the case for property of an enemy embarked in a neutral house of business[1].

Further, a ship may have been transferred by enemies to friends with all the external completeness necessary by the laws of the neutral country for the grant of its flag, but the vendors may have retained an undisclosed interest, the apparent transaction being only a blind to avoid capture. In that case it is thought to be no want of respect to the flag she bears that it shall not protect her. Belligerents, conceiving themselves to have a right to all enemy property at sea, call the transaction a fraud on their rights, and the honour of the neutral state is not thought to be engaged in the protection of fraud. To cut short all tedious and often baffling investigations into such frauds, the French practice, dating as far back as the *Réglement* of 1694 and confirmed by that of 1778, ignores all sales of ships by enemies not made by authentic acts previous to the declaration of war or the commencement of hostilities[2]. The English practice lays down no rigid rule except one which it applies to cargoes as well as to ships, namely that "in case of war, either actual or imminent...a mere transfer by documents which would be sufficient to bind the parties is not sufficient to change the property as against captors, as long as the ship or goods remain *in transitu*....The true ground on which the rule rests...is that, while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods. The difficulty of detecting frauds if mere paper transfers are held sufficient is so great, that the courts have laid down that in order to defeat the captors the possession as well as the property must be changed before the seizure....The only question of law which can be raised is how long the *transitus* continues, and when and by what means it is terminated....It is true that in one sense the ship and goods may be said to be *in transitu* till they have reached their original port of destination, but" for

[1] *The Ariel*, 11 Mo. P. C. 119, as to liens.

[2] By Art. 9 of the French *réglement* of 1778, a ship of which the neutral character is in doubt is to be condemned if her supercargo or more than one third of her crew are enemy subjects: 4 Holtzendorff's *Handbuch* 584, where also Geffcken states that England formerly refused to recognise the neutrality of a ship with an enemy crew.

the present purpose "the *transitus* ceases when the property has come into the actual possession of the transferee," as it may do by the ship's calling at an intermediate port where the transferee can take possession[1].

With regard to ships of war the British rule goes further. They are not allowed by it more than by the French rule to be sold at all during war. Even supposing that the ship of war of a belligerent has taken refuge in a neutral port and is there dismantled, her sale in that port would be incompatible with the duty of the neutral state to intern her. But if a private ship escapes pursuit by taking refuge in a neutral port, there seems to be no reason why she should not be sold while there, or why a person claiming her by a previous sale should not take possession of her there; and with this the English practice appears to agree[2].

When a transfer of a ship made earlier than the commencement of her voyage is presented to the court, "the circumstances attending a sale are severely scrutinised, and a transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or the profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war[3]." Moreover the neutral "claimant shall be held to strict proof of ownership, and any circumstances of fraud or contrivance, or attempt at imposition on the court in striving to make out his title, shall be taken as fatal[4]." The court "looks for that correspondence and other evidence which naturally attends a

[1] The extracts are from the judgment delivered by Lord Kingsdown on the appeal in *The Baltica*, 11 Moore P. C. 145, 146. Possibly the transferee might now obtain delivery or possession at sea by instructions to the master to hold on his behalf, communicated by wireless telegraphy.

[2] *The Minerva*, 6 C. Rob. 396; *The Georgia*, 7 Wallace 32.

[3] Hall, § 171. *The Ariel*, 11 Mo. P. C. 119, escaped condemnation although a part of her purchase money was left to be paid out of her earnings, because this was held on appeal not to create a lien on the ship and freight.

[4] So stated in *Bullen v. The Queen*, 11 Mo. P. C. 286. In that case Hall says, § 171, "the sale was genuine, but it had not been made to the persons who professed to be owners. Restitution was decreed, but without costs or damages."

transaction, accompanies it or follows it, and which when it bears upon the face of it the aspect of sincerity will always receive its due weight," rather than "to documents of a formal nature...often procured with extraordinary facility[1]." "The ship has been left in the trade and under the management of the former owner. Wherever that fact appears the court will hold it to be conclusive, because from the *evidentia rei* the strongest presumption necessarily arises that it is merely a covered and pretended transfer[2]."

Where the character of a ship sailing under a neutral flag is not open to question on the ground of any transfer, but the character of the persons who were and are her owners has changed during her voyage, it is their character at the time of the capture that will determine her fate[3].

Enemy character of cargoes. We have seen that the Anglo-American rule, adopted for the purpose of checking what are described as frauds on belligerent rights, is that the enemy character of property belonging to a hostile owner cannot be divested during a voyage by transfer to a neutral owner. It is a rule of prize law, opposed to the common law which allows transfers of property *in transitu*. A similar invalidity is asserted for a transfer made before the outbreak of the war, where consequently there could be no hostile owner at its date, if "in the clear expectation of both the contracting parties" the state to which the transferor belongs is "likely to become a belligerent before the arrival of the property which is made the subject of their agreement[4]." And a further Anglo-American prize rule lays down that "property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu* is to

[1] Dr Lushington in *The Soglasie*, Spinks 106.

[2] Lord Stowell in *The Jeremy*, 4 C. Rob. 31.

[3] *The Indian Chief*, 3 C. Rob. 12, was saved from condemnation by Mr Johnson's resuming his American domicile during her voyage. See what is said above, p. 169, note, about a seeming exception in the case of *The Danckebaar Afrikaan*.

[4] *The Vrouw Margaretha*, 1 C. Rob. 336; *The Jan Frederick*, 5 C. Rob. 128—the words between inverted commas in the text are from Lord Stowell's judgment in this case; *The Ann Green*, 1 Gallison 274, judgment delivered by Story.

be considered as enemies' property. When the contract is made in time of peace or without any contemplation of a war, no such rule exists." This rule is saved from being opposed to the common law by the principle that "capture is considered as delivery: the captors by the rights of war stand in the place of the enemy[1]."

In France the *réglement* of 26 July 1778, arts. 2 and 11, provides that the neutrality of goods can be proved only by the documents on board. Apparently this must have a similar effect to the English rule ignoring the transfer *in transitu* of enemy property to neutrals, for the documents relating to what had occurred during the voyage would not be on board. But it is said that "goods sent by a neutral to a person of enemy nationality, with an agreement that their property shall pass to the latter only on delivery, are not subject to capture, with a reservation of the due appreciation of the frauds possible in such agreements[2]."

It is an Anglo-American rule that "the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be[3]"; the consequence being that "the

[1] The words in the text between inverted commas are from the judgment of the lords in *The Sally*, 3 C. Rob. 300, note. "The ordinary state of commerce is that goods ordered and delivered to the master are considered as delivered to the consignee, whose agent the master is in this respect; but," apart from the prize rule now under consideration, "there would unquestionably be nothing illegal in contracting that the whole risk should fall on the consignor till the goods came into possession of the consignee....If" in those circumstances, as a consequence of the capture, "the consignee refuses payment and throws" the loss "upon the shipper, the shipper must be supposed to have guarded his own interests against that hazard, or he has acted improvidently and without caution." This quotation is from Lord Stowell's judgment in *The Packet de Bilboa*, 2 C. Rob. 133. See also *The Anna Catherina*, 4 C. Rob. 107, and *The San José Indiano*, 2 Gallison 268.

[2] Despagnet, § 651, quoting *The Laura-Louise*, Barboux, p. 120, in which the goods comprised in the bills of lading numbered 1, 2, 3 and 8 seem to be those referred to.

[3] Lord Stowell in *The Phœnix*, 5 C. Rob. 21, where it is stated to be an old rule, "no longer open to discussion."

produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy[1]." The produce becomes safe from capture when sold to a friend, but is subject to capture as long as it remains the property of the owner of the soil. This is only a particular application of the doctrine which asserts the enemy character of property connected with a house of business in enemy territory, for agriculture is a business, though it is sometimes mentioned as a special rule based on some inherent tie between the soil and its produce. If during the war the other belligerent has occupied the locality in so stable a manner that its own trade with it is free, notwithstanding that there has not been cession or conquest, a third power at war with the occupying belligerent will treat the locality as a possession of its enemy, and apply the rule to justify the capture of its produce while the property of the owner who is politically its friend[2].

Enemy Character of a Ship by reason of her Service. A ship which by the criterions of character thus far discussed would be classed as neutral will be treated as hostile if she is engaged in the enemy's service. This will be the case if she is employed as a transport, as was *The Friendship*, 6 C. Rob. 420. Another example of that service, belonging not to the precedents of courts but to history, is that of the *Kow-shing*, whose British owners chartered her to the Chinese government for the carriage of troops to Korea. While so employed she was sunk by the Japanese in the first action of their war with China, which ensued on the subject of their respective relations to Korea[3]. An analogous case was that of *The Orozembo*, 6 C. Rob. 430, a neutral-owned ship hired in a neutral port by the agent of a belligerent, and employed in carrying three military and two civil officers of the latter to one of his colonies. In condemning her Lord Stowell refused to make a distinction on the ground of the small number of persons carried. Indeed the case was essentially different from that of persons being carried as passengers who fall within the description of contraband or

[1] Lord Stowell in *The Vrow Anna Catharina*, 5 C. Rob. 167.

[2] *Thirty Hogsheads of Sugar* (*Bentzon claimant*) *v. Boyle*, 9 Cranch 191.

[3] See above, p. 26.

analogues of contraband, with which we shall have to deal in explaining the laws of neutrality. The ship herself had passed into enemy service, which was enough for her condemnation whatever use the enemy had made of her.

In cases of this class if the owner or his agent is unaware of the fact that the hirer of the ship is an agent of the belligerent government, or if that government impresses the ship into its service by violence, the practice has been that she will not the less be condemned. Lord Stowell said in *The Orozembo*: "It will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found....If imposition has been practised it operates as force; and if redress in the way of indemnification is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger;...otherwise such opportunities of conveyance would be constantly used, and it would be almost impossible, in the greater number of cases, to prove the knowledge and privity of the immediate offender." And on these principles he condemned *The Carolina*, 4 C. Rob. 256, on facts which, speaking of that case in *The Orozembo*, he thus summed up: "There was no *mens rea* in the owner or in any other person acting under his authority. The master was an involuntary agent, acting under compulsion put upon him by the officers of the French government, and, so far as intention alone is considered, perfectly innocent." Wheaton quotes this doctrine with acquiescence[1], but we agree with Hall, who says: "It is no doubt proper to throw upon the neutral the onus of proving his innocence, and to sift the evidence which he produces with the most jealous suspicion; but to punish him for the act of another person, of which he has been the unwilling or unconscious subject, is as useless as it is wrong. The belligerent cannot be intimidated by losses inflicted on his victim[2]."

[1] *Elements*, § 502, Dana's numbering.

[2] § 249, note.

Various Points of Prize Law.

Privateers. A privateer was a privately owned ship, furnished with a commission of war empowering her to carry on or act in all warlike operations, but usually confining herself to action against commerce, and commanded by officers appointed by her owners, who were however subject to be controlled by the commanders of public ships of war sailing under the same flag. Her commission was called a letter of marque, the origin of which name we have seen to have been connected with the system of reprisals[1], and her action was a part of the general reprisals which survived as an accompaniment of war; but it had the private gain of her owners as its motive, the gain made by such reprisals never being applied to the redress of the injuries deemed to have provoked the war. The first article of the Declaration of Paris in 1856 ran that "privateering is and remains abolished," but the United States declined to adhere to it on the ground that, so long as the private property of enemies remains capturable at sea, it would operate unfairly towards powers not maintaining large public navies. As between the powers which have subscribed to the Declaration, light has been thrown on its precise meaning by the regulations respectively made for the Russian volunteer fleet, the mail steamers subsidised by this and other states, and the volunteer fleet contemplated by Prussia in 1870. None of those regulations having excited any serious remonstrance, there appears to be an understanding that what is prohibited is not the use in war of privately owned ships under commanders at least temporarily belonging to the public navy, but the combination of private ownership with private command. Privateers presenting that combination have not been employed since 1856, even by the few powers which have not adhered to the Declaration. *The Alabama* and her consorts which devastated the commerce of the United States during the great civil war were public ships of the Confederate States' navy.

Freight. We have seen the rules of the Consolat del Mar as to the freight payable in cases of maritime capture[2]. With

[1] Above, p. 9.

[2] Above, p. 137.

that concerning the freight payable to a neutral shipowner for the carriage of enemy's goods we need not concern ourselves, the capture of enemy's goods under the neutral flag having been abolished[1]. The rule that the neutral owner of goods found on board a captured enemy's ship could get them only on paying the freight which would have been earned by carrying them to their destination was plainly unjust, as was pointed out by Bynkershoek[2]. It has accordingly been decided that the captor can claim the freight only when he has performed the contract of the ship, and is even then liable to have any damage which he has done to the property, or caused by his misconduct, set off[3].

Recapture. Recapture, to which rescue as a technical term is equivalent[4], is when a ship captured by the enemy and in his power, not necessarily in his actual possession[5], is retaken by her compatriots. The question then arises whether she shall be restored to her original owner, by an application of the Roman doctrine (*postliminium*) which treated men and things recovered from the enemy as restored to their pristine condition, a reward being allowed to the recaptor as salvage, or whether she shall become the property of the recaptor, the original owner being deemed to have lost his property by her misadventure. We

[1] It may be stated that in England the neutral's lien for his freight was held to be prior to the captor's expenses, except when the ship was plying between ports of allied enemies. Where the voyage was between ports of the opposed belligerents, the captor was allowed priority for his law but not for his other expenses. *The Vrow Henrica,* 4 C. Rob. 343. And where the ship was hired for a gross sum, the captured enemy's goods were adjudged to bear only their proportion of that sum: *The Antonia Johanna,* 1 Wheaton 159.

[2] *Quæstiones Juris Publici,* l. 1, c. 13.

[3] *The Vreyheid,* decided in 1784 by the lords of appeal, as mentioned by Lord Stowell in *The Fortuna,* 4 C. Rob. 278, in which his lordship quoted Bynkershoek.

[4] *Recousse vient de* recutere, *rescousse de* reexcutere; *ces deux termes sont équipollents et signifient reprendre:* 2 Rivier 357.

[5] Wheaton, *Elements,* § 381, Dana's numbering. He quotes *The Edward and Mary,* 3 C. Rob. 305, where the captors had been prevented by the weather from sending a boat on board the prize, and *The Pensamento Feliz,* Edw. 115, where the recapture consisted in bringing a vessel out of a hostile harbour, in which however she had not been seized.

have seen that the Consolat del Mar adopted the latter solution[1], on condition that the first captor had brought the ship to a place of safety, *intra* or *infra præsidia* as it is expressed in subsequent technical language, which in the time of the Consolat would scarcely happen unless she had been brought to a port of the captor's country, but in the times of more developed navies might happen by her being brought within the protection of a fleet. The principle was that in order to change the property the possession resulting from the capture must be what is often described as firm, and this it was sometimes thought that the possession had not been when the recapture was immediate, although the ship had been brought *intra præsidia*. Hence it became a widely accepted rule that the original owner did not lose his right until the ship had been in the enemy's possession for twenty-four hours or during a night (*pernoctatio*)[2]. Again, after condemnation in a prize court of the enemy the ship might be taken from her new owner, whether the original captor or another, but could not be retaken from the original captor as such, being no longer in his possession or power as such; whence it was easy to lay down condemnation as the dividing line up to which, and not beyond which, recapture for the benefit of the original owner was possible. Thus there were several systems, adopted in different countries, which limited the right of the original owner, that practised in England being the one which drew the line at condemnation[3]. But in 1786 a British act of parliament, adopting the principle of postliminy, extended the right of the original owner without

[1] Above, p. 137.

[2] Grotius, 3, 6, 3. He connects the rule of the Consolat with that of the Roman *postliminium*, by which a citizen lost his rights on being brought *intra præsidia* of the enemy, and recovered them on being brought back *intra præsidia* of Rome or her forces. Pomponius in Dig. 49, 15, 5. To the twenty-four hours rule Grotius attributes a German origin, quoting a Lombard law about a wounded beast, and citing Albericus Gentilis (*Hisp. Adv.*, l. 1, c. 3) for its observance in England and Castile. Gentilis treats the common military opinion as being to the same effect. If he is right about the English rule of his time, it must have afterwards been changed.

[3] Wheaton states this; *Elements*, § 373, Dana's numbering; and it is implied in the United States act of 1800; but see Gentilis as referred to in the last note.

limitation, the recaptors being entitled, even after the condemnation of the ship, only to salvage, fixed for ships of the navy at an eighth of the value and for privateers at a sixth; only if the ship had been "set forth by the enemy as a ship of war," she was to be the prize of the recaptors. This was re-enacted by the Naval Prize Act 1864, s. 40, with the omission of what related to privateers, which had become unnecessary, and with the provision that "where the recapture is made under circumstances of special difficulty or danger," the prize court may increase the "prize salvage" to a fourth of the value as the maximum; also the case for ousting the original owner being expressed as that when the ship has been "set forth or used" by the enemy as a ship of war. The United States act of congress of 3 March 1800 maintained the rule which drew the line between the original owner and the recaptor at condemnation, but where the ship had been "set forth and armed" as one of war it did not oust the original owner, only increased the amount payable as salvage. In France, where the twenty-four hours rule was formerly practised, the Instructions of 1870, Art. 11, maintain the right of the original owner of a rescued national ship without limit, but provide that neutral ships taken by the enemy, which have been more than twenty-four hours in his possession, are to be treated as enemy ships, unless in exceptional circumstances, to be appreciated by the government. The right of the original owner is also maintained without limit by the Prize Code of the Institute of International Law[1].

It may happen that the ship or goods of neutrals or other friends are recaptured. Their country may, either as an ally or separately, be at war with the same country with which we are at war, and their property may be taken by the cruisers of that country and recovered by ours. Or they may be carrying to us what our enemy captures as contraband of war, and our cruisers may recover it. And there may be other cases. Lord Stowell decided that, having regard to the diversity of the rules which are applied in different countries to the question of property between the original owner and the recaptor, he must apply the rule on that question of the country to which the recaptured property belongs, or if there should exist a country in which no

[1] Arts. 119–122, 9 *Annuaire* 242.

such rule prevails, then the English rule[1]. If the property is adjudged to the original owner, then no salvage is due for the recapture of friend's goods which must have been liberated by our enemy's prize court if they had been carried there. But if it must be supposed that they would have been condemned by our enemy, either lawfully or because he notoriously violates international law, a service is rendered by the recapture and salvage must be paid[2].

Ransom Bills. When an enemy ship is ransomed by her captor, a ransom bill is given by her master, in which are expressed the conditions under which she is allowed to pursue her voyage without liability to molestation by any ship of her captor's or an allied nationality which she may meet, and the sum to be given for the permission. He also surrenders a hostage, who "has a right of action in the courts of his own country against the master, and against the owners of the ship and cargo, to compel them to perform the conditions of the contract under which their property has been restored to them, and the due performance of which is a necessary condition for the recovery of his freedom[3]." And it is by the use of this right of the hostage that the captor has most commonly in England obtained payment of the ransom, his direct right to do so by suit on the bill being questioned on the ground of his enemy character[4].

[1] *The Santa Cruz,* 1 C. Rob. 49.

[2] Wheaton, *Elements,* §§ 364–6, Dana's numbering; where it is shown that both the British and United States prize courts acted on these principles during the wars of the French revolution and first empire.

[3] The words are from 2 Twiss 358.

[4] The captor was allowed to recover in his own name in *Ricord v. Bettenham,* 3 Burrow 1734, and by Lord Mansfield in *Cornu v. Blackburne,* 2 Dougl. 640; but this was refused in *Anthon v. Fisher,* Dougl. 649, note, and Lord Stowell stated the law to the latter effect, in *The Hoop,* 1 C. Rob. 201. In the United States an enemy recovered in his own name on a ransom bill in *Goodrich v. Gordon,* 15 Johnson 6. In *Crawford v. The William Penn*—Peters, Circuit Court, 106; Scott 580—an alien enemy was allowed to sue in his own name on a bottomry bond given for advances made to a cartel ship, and Washington, J., after quoting *Cornu v. Blackburne* and *Anthon v. Fisher,* said: "The case of a ransom bond is very different from that of a contract arising out of a licensed trade. In the former the hostile character of the obligee is in no respect removed, on

By the Naval Prize Act 1864, s. 45, following a policy maintained by parliament from 1782, the king in council can make such orders as he thinks fit for prohibiting or allowing the ransom of British ships taken by the enemy, and any one ransoming or contracting to ransom any ship or goods in contravention of any such order in council may be fined by the court of admiralty, in any sum not exceeding £500. By the same section all contracts and securities for ransom are placed under the exclusive jurisdiction of the court of admiralty as a prize court.

Naval Bombardments.

Bombardments by Naval Forces were the subject of the Ninth Convention resulting from the Hague Conference of 1907. See above, p. 87, for the corresponding regulation by land, H XXV.

Art. I. The bombardment by naval forces of ports, towns, villages, habitations or buildings which are not defended is prohibited.

A locality cannot be bombarded for the sole fact that automatic submarine contact mines are moored before its port.

Great Britain, France, Germany and Japan have refused to accept the second paragraph. They are right. A place cannot

the contrary it is an act of hostility which gives rise to it. In the latter case the hostile character of the party with whom the contract is made does not attach either to him or to the contract. 'He is to be regarded,' in the words of Lord Ellenborough, 'virtually as an adopted subject of Great Britain, and his trade as British trade.'...It must nevertheless be acknowledged that in the case of *Kensington v. Inglis*, 8 East 273, the court seemed to be of opinion that, even in the case of a licensed trade, the suit cannot be maintained in the name of the alien enemy." In truth, between (1) the contracts of an enemy by nationality who, being resident in the country under express or implied permission, is a friend by the doctrine of trade domicile in war; (2) contracts of an alien enemy entered into under a license to trade; and (3) ransom bills; there may be drawn graduated distinctions, not perhaps imperceptible, but which it may be hoped that in future English judges will sweep away, allowing in every case suit in the name of the person who is allowed to contract, as is regularly done elsewhere in Europe and, it is believed, in the United States. With reference to (1) see above, pp. 54, 55, and the citation from Lord Lindley with the note on it, above, p. 165. And with reference to (2), see above, p. 161.

be deemed undefended when means are taken to prevent an enemy from occupying it. The price of immunity from bombardment is that the place shall be left open to the enemy to enter. Spain is not a party to the convention.

Art. II. Nevertheless, this prohibition does not include military works, military or naval establishments, stores of arms or of material of war, workshops or plant suitable to be used for the wants of the enemy fleet or army, or ships of war lying in the port; all which the commander of a naval force may destroy by cannon after a summons fixing a reasonable delay, if all other means are impossible and the local authorities have not proceeded to destroy them within the time fixed. In that case he incurs no responsibility for the involuntary damage which may have been occasioned by the bombardment.

If military necessities demanding immediate action do not permit the delay to be granted, it is understood that the prohibition of bombarding the undefended town remains as in the case of Art. I, and that the commander shall make all the dispositions required for causing the least possible inconvenience to the town.

The word "installations" translated "plant" in the first paragraph was intended to include such as are not of exclusively warlike use, and in the report of the committee railways and floating docks were given as examples. But the word "provisions," which for example would include coal, was not admitted, since it was thought that the term "material of war" gave sufficient satisfaction to military requirements. As an example of the military necessities mentioned in the last paragraph it was pointed out that a naval commander must be allowed to open fire immediately on ships lying in a road, in order to prevent their joining an enemy fleet close at hand.

Art. III. Undefended ports, towns, villages, habitations and buildings may be bombarded after express notice, if the local authorities refuse to obey a formal summons to furnish requisitions of victuals or other provisions, necessary for the actual wants (*besoin présent*) of the naval force before the locality.

These requisitions shall be in proportion to (*en rapport avec*) the resources of the locality. They shall only be demanded on the authority of the commander of the said naval force, and shall as far as possible be paid for in ready money; if not, the fact of furnishing them shall be recorded by receipts.

Art. IV. Bombardment of undefended ports, towns, villages, habitations or buildings, for the non-payment of contributions in money, is prohibited.

It will be seen that all the preceding Articles except the second paragraph of Art. I are in agreement with the doctrine which has been laid down on pages 87, 88, only I did not there consider the case of requisitions in kind, which Art. III allows on conditions similar to those laid down by H LII—above, p. 107—for requisitions on land. Attention may be drawn to one point in which the rule for naval forces is even more strict than that in land war, for while H LII allows requisitions for supplying the necessities of the army of occupation, of which only a small part may be in or near the place subjected to the requisitions, the naval Article allows them only for those of the force before the locality. A contribution in money for military necessities, which H XLIX—see above, p. 105—contemplates on land, is excluded by the naval Articles. And with reason, because the naval force has no other market at hand in which to supply itself with what the locality cannot furnish in kind, and the money, unexpended, would not relieve its necessities.

Art. V adopts H XXVII—see above, p. 89—substituting the following for its second paragraph:

> It is the duty of the inhabitants to point out these monuments, edifices and places where the sick and wounded are collected by visible signs, which shall consist in large stiff rectangular panels, divided by a diagonal into two coloured triangles, black above and white below.

> Art. VI. *Except when military exigencies would not permit it, the commander of the attacking naval force must, before commencing the bombardment, do all he can to warn the authorities.*

The difference between this Article and H XXVI—see above, p. 88—is due to the able representation of the possible exigencies of naval war, made by the British delegate Captain Ottley and the Japanese delegation.

Art. VII reproduces H XXVIII—above, p. 89.

Postal Correspondence at Sea.

The practice as to neutral mail bags which was adopted in the American civil war has been sanctioned, and extended to belligerent mail bags, by the following clauses of the Eleventh Convention due to the Hague Conference of 1907.

Art. 1. The postal correspondence whether of neutrals or of belligerents, and whether its character is official or private, found at sea in a ship whether neutral or enemy, is inviolable. If the ship is seized, it must be forwarded by the captor with the least possible delay. These dispositions do not apply, in the case of a breach of blockade, to correspondence coming from or destined to the blockaded port.

Art. 2. The inviolability of postal correspondence does not exempt neutral mail boats from the laws and customs of war concerning merchantmen in general. Nevertheless, they ought to be searched only in case of necessity, and then with all the consideration and speed possible.

It must be mentioned to the credit of Germany that this beneficent regulation was proposed at the conference by her delegate Herr Kriege, who explained that "postal correspondence" is not intended to include parcels sent by post.

The Red Cross in Naval[1] *War.*

The Hague Conference of 1899 produced a *Convention for the Adaptation to Naval War of the principles of the Geneva Convention of* 1864. An amended and enlarged form was voted by the Hague Conference of 1907, the substance of the most important articles of which will be here stated.

Hospital-ships may be either belligerent or neutral. The former may either be military, that is public, hospital-ships, having been constructed or equipped by a belligerent state specially and solely for the purpose of assisting the wounded, sick, or shipwrecked—or private ones, having been equipped wholly or in part at the cost of private individuals or officially recognised relief societies, but these must be furnished with an official commission from a belligerent state, and with a certificate from the competent authorities declaring that they had been under their control while fitting out and on their final departure. The names of both must be notified by the belligerent to the hostile power at the commencement or during the course of hostilities, and in any case before they are employed. Both classes are to be respected, even during fighting as far as possible, and cannot be captured while hostilities last, and

[1] *Guerre maritime* in the French text, but in English "maritime" is usually contrasted with "inland," and does not mean what is or takes place on the sea.

military hospital-ships will not be on the same footing as men-of-war as regards their stay in neutral ports.

Neutral hospital-ships are those equipped wholly or in part at the cost of private individuals or officially recognised societies of neutral countries, and in order that they may be entitled to the same rights as belligerent ones they must have placed themselves under the direction of one of the belligerents, with its authority and the previous consent of their own government, the former being obliged to notify their names to its adversary as in the case of its own hospital-ships.

All hospital-ships are to be painted white outside, with a horizontal band about a metre and a half in breadth which is to be green in the case of military ones, red in that of private ones whether belligerent or neutral; and all must adopt measures with a view to making the colours in which they are painted sufficiently visible at night. All must also hoist the white flag with a red cross together with their national flag, and the vessels of neutral ownership must in addition fly from the mainmast the flag of the belligerent under whom they have been placed, the latter however to be lowered during any detention of them by the enemy. Only Turkey reserved its right to use the crescent instead of the cross, and Persia that to use the Lion and Sun.

Thus legitimated and distinguished, all hospital-ships "shall afford relief and assistance to the wounded, sick and shipwrecked of the belligerents independently of their nationality; the governments engage not to use them for any military purpose; they must not in any way hamper the movements of the combatants; during and after an engagement they will act at their own risk and peril; the belligerents will have the right to control and visit them, they can refuse to help them, order them off, make them take a certain course and put a commissioner on board; they can even detain them if important circumstances require it; as far as possible the belligerents shall inscribe in their sailing papers the orders they give them": Art. 4. The hospital-ships may use wireless telegraphy, subject to the right of a belligerent commander to require the removal of the apparatus, or its reduction so as to allow messages to be received but not sent. They may carry only such cannon as they need

for signalling, but their *personnel* may be armed for their own defence and that of the persons under their care.

No neutral vessel, even though a casual volunteer, is to be liable to capture for picking up or carrying wounded, sick, or shipwrecked belligerents; and neutral mercantile vessels requisitioned or volunteering for hospital service under promise of immunity, after having committed infractions of neutrality, are freed from the penal consequences of such infractions to the extent of the promises made.

Art. 9 of the convention of 1899 provided that "the shipwrecked, wounded or sick of one of the belligerents who fall into the hands of the other are prisoners of war. The captor must decide according to circumstances whether it is best to keep them or send them to a port of his own country, to a neutral port or even to a hostile port. In the last case prisoners thus repatriated cannot serve as long as the war lasts." This is reproduced by Art. 14 of the form voted in 1907, and is therein supplemented by an Art. 12, proposed by the German delegation and supported by M. Renault, the French reporter of the draft, as carrying out the principle of the old Art. 9: "Every belligerent ship of war may demand the surrender to it of the wounded, sick or shipwrecked who are on board hospital-ships, whether military or belonging to red-cross societies or to individuals, merchantmen, yachts or boats, whatever may be the nationality of such vessels." The argument of M. Renault was that in the absence of a convention international law would allow a belligerent not only to seize enemy combatants found on board a neutral vessel, but also to capture and confiscate the vessel as having rendered an unneutral service to the enemy; and that if shipwrecked combatants, for example, escaped captivity by finding refuge on board a neutral vessel, belligerents would fend off the charitable action of neutrals which threatened them with irreparable damage. He also pointed out that belligerents cannot force a neutral merchantman to change her route and destination, as they are allowed to do for hospital-ships. Sir Edward Fry at the discussion in the committee placed on record that "the British government cannot acquiesce in the opinion expressed in the report as to the right of a belligerent ship of war to require the surrender of wounded, sick and

shipwrecked combatants on board a merchant vessel sailing under a neutral flag. Failing a special convention, his government considers that the recognition of such a right cannot be based on the existing principles of international law." This reservation was maintained at the full sitting of the Conference in which the form of the convention was voted, as an expression of opinion on the law in the absence of a convention, but the Art. 12 stands without question as a part of the form voted.

It is however scarcely the less necessary to form a judgment on the question of principle on which a difference of opinion between such authorities was expressed. To do so we must first remember one point on which the principles of neutral duty allow no controversy. If a neutral ship does not surrender to their enemy the combatants in a condition to fight again whom she has saved, she must carry them to her own country and they must there be interned. And this must equally be understood of those who may be expected to be again in a condition for fighting when their wounds have been healed. The real question is therefore whether the choice between the surrender and the internment of the persons concerned is to rest with the belligerent or the neutral. In favour of the neutral it may be urged that those who are under his flag at sea are constructively already in his country, and that their surrender can therefore no more be demanded than if they were physically in it. The belligerent may reply that the constructive identification of a ship with its country has not been admitted by the laws of war, as is proved by the right to take contraband goods, and formerly enemy's goods, from under the neutral flag; and that in the treaties stipulating the rule "free ships free goods," it is common to find it laid down that the freedom of the flag covers all persons on board except those in the enemy's military service. To this it must be added that the belligerent commander cannot fairly be expected to trust the promise of a private shipmaster to carry his passengers to a port where they will be safely interned, especially since the performance of that promise might be defeated by other causes than bad faith. My conclusion is that the reply is sufficient, and that Art. 12 of the draft convention of 1907 requires from a neutral no more than, in its absence, belligerents could insist on with good warrant. But

I cannot agree that in the absence of the article a neutral shipmaster who had taken the persons in question on board would render his ship liable to confiscation for rendering unneutral service to the enemy. There would be no ground for presuming that he intended to restore them to the military service of their own side. If he had the correct intention to see to their safe internment, it is not clear what benefit the enemy would derive from internment being substituted for capture, and there would be no room for suggesting the existence of an improper arrangement between him and the enemy. Great Britain has ratified the convention with no other reservation than that it "understands Art. 12 to apply only to the case of combatants rescued during or after a naval engagement in which they have taken part."

The duty of internment to which we have called attention is recognised by provisions that the shipwrecked, wounded or sick who are landed at a neutral port with the consent of the local authorities, or who are taken on board a neutral ship of war, must, failing a contrary arrangement between the neutral state and the belligerents, be guarded by the neutral state, so that they cannot again take part in the military operations; and that the expenses of entertainment and internment shall be borne by the state to which the shipwrecked, wounded or sick belong: Arts. 13, 15.

There are express provisions (Art. 10) that the religious, medical or hospital staff of any captured ship is inviolable, and cannot be made prisoners of war, and that the belligerents must assure to the staff which has fallen into their hands the enjoyment of the same salaries as those of the same grades in their own service. Also that sailors and soldiers who are taken on board when sick or wounded, to whatever nation they belong, shall be protected and cared for by the captors: Art. 11.

CHAPTER VII.

NEUTRALITY.

The Theory of Neutrality.

A STATE is neutral when there is a war and it is not in a state of war with either belligerent. If its conduct is unbecoming to that condition, even if it uses violence in favour of one of the belligerents, these are violations of the duties incumbent on neutrals, but its condition is still that of neutrality so long as neither its own choice nor that of the belligerent whom it has provoked has placed it in the legal condition of being at war[1]. The fact of neutrality is as old as war, but the technical term from that root is not traced by Nys further back than to treaties and edicts drawn up in French at the close of the fifteenth century, before which time we have *stille sitzen*, to sit still—*unpartyschung*, impartiality—*guerræ abstinentia*, abstinence from the war—and, especially with regard to naval war, to be *in treuga*, in truce, *in pace*, or simply a friend, *amicus*. But, once introduced, *neutralité* with the words from the same root in Latin, Italian and German were freely used, so that only their desire to maintain classical Latin caused Grotius to write *in bello medii* and Bynkershoek *non hostes*[2].

In considering the duties which are incumbent on neutrals it is important to bear in mind that they exist only so long as the neutrality is maintained. There is no general duty of maintaining the condition of neutrality. On the contrary, the general duty of every member of a society is to promote justice within it, and peace only on the footing of justice, such being

[1] See above, p. 2, for war not being set up by mere acts of force without the will to set it up.

[2] Nys, *Le Droit International*, t. 3, pp. 559, 560.

the peace which alone is of much value or likely to be durable. Thus in a state the man would be a bad citizen who allowed a crime to be committed before his eyes without doing his best to prevent it, or who refused to assist the magistrates in punishing crime; and in the society of states the action of all the members in upholding its laws is the more required since an organised government is wanting. Grotius was so convinced of the evil character of studied aloofness that, as we shall see, he allowed that conviction to affect his view of the conduct to be observed by third states even while maintaining their neutrality. The general voice has not been with him to that extent, although belligerents often claim that the justice of their cause entitles them to what they call a benevolent neutrality. Bentham laid down that "a disinterested legislator would regard as a positive crime every proceeding by which a given nation should do more injury to foreign nations collectively, whose interests might be affected, than it should do good to itself.....In the same manner he would regard as a negative offence every determination by which the given nation should refuse to render positive services to a foreign nation, when rendering them would produce more good to such foreign nation than it would produce evil to itself[1]." And Lorimer has defined the cases in which neutrality is justifiable as those in which the third state has no sufficient knowledge of the merits of the quarrel, or in which it "may, from the limited character of its own resources, from its inability to secure allies, from its geographical position or other causes, be totally incapable of affecting the war one way or the other, or may be capable of affecting it only at a greater probable loss to itself than gain to the belligerent whom it knows to be in the right[2]." We may sum up by saying that neutrality is not morally justifiable unless intervention in the war is unlikely to promote justice, or could do so only at a ruinous cost to the neutral.

The duties which are incumbent on neutrals so long as they continue to be in the legal condition of neutrality are mainly founded on the importance, in international as in all other relations, of a frank sincerity. Indeed that quality is more important in international than in other relations, because states

[1] *Principles of International Law, Essay* 1.

[2] *Institutes of the Law of Nations,* vol. 2, pp. 127, 128.

over which there is no sovereign power must look chiefly to themselves for their security, and if they were harassed by doubts as to the conduct to be expected from powers not openly hostile, their situation would be so confused that they would often feel compelled to extend the area of war in a manner really needless. The reason which condemns the sudden commencement of a war which nothing had foreshadowed, namely the necessity for the sake of good order that states shall know how they stand with regard to one another, demands a loyal abstinence from real participation in a war on the part of all those who do not avowedly participate in it[1]. And the argument applies equally to the conduct which ought to be observed by states in presence of an armed civil dissension amounting to war in one of them. Neither friendship for the government which is attacked nor sympathy with the cause defended by the insurgents can justify a foreign state in a benevolent neutrality towards either, as soon as the contest has assumed such dimensions or is waged under such conditions that it can no longer be ignored as war. Civil combatants as well as international ones have a right to know how things stand with regard to every one. The duties which on the principle of avoiding all real participation in the war arise for states holding the legal condition of neutrality and their subjects, and the conduct to be observed by them, are called neutral duties and conduct.

In order to pass from the principle to rules it is necessary to seek as clear an understanding as possible of what is real participation in war, and we should launch into a vagueness productive of controversy rather than of enlightenment if we carried that notion further than participation in a specific operation of war. Hence,

Neutrality enjoins abstinence from taking part in any operation of war, and from interfering with any operation of war which is legitimate as between the belligerents, but not abstinence from any thing merely because it strengthens a belligerent.

For instance, siege being a legitimate operation of war as between the belligerents, neutrality enjoins abstinence from introducing supplies into any place which is under siege, but it

[1] There must not be *une neutralité frauduleuse, dont personne ne veut être la dupe:* Vattel, l. 3, § 104.

does not enjoin abstinence from general commerce with either belligerent, although commerce enriches and therefore strengthens those with whom it is carried on. For instance again,

A neutral state must not permit either its subjects or a belligerent to make any such use of its territory as amounts to taking part in an operation of war; a maxim which is comprised in the former one, since a state is necessarily a party to the use which it allows to be made of its territory, but which is so important as to deserve separate statement[1].

But a moment's reflection will show that, true as these statements are, they are not sufficient to remove all difficulties. When blockade is declared of a port which is not besieged, or of a line of coast not too extensive to be effectively watched but on which a landing is not being attempted, what military operation, legitimate as between the belligerents, is proceeding, with which it would be a breach of neutral duty to interfere? What is being done in that case is that a blow is being struck at the enemy's general commerce, and that neutrals are asked not to interfere with that blow, so long as their flag is not excluded from a larger area than that from which it is possible to exclude the enemy's flag also. Now this may be a good argument while the capture of enemy property at sea is maintained, but it would fall to the ground if the destruction of the enemy's commerce were decreed not to be a legitimate operation of naval war as between belligerents; and yet the demand for the abolition of the capture of enemy property at sea has not been accompanied, at least to any great extent, by a demand for restricting blockade to besieged ports. Again, it may be conceded that carrying arms or ammunition with destination to a belligerent port is taking part in an operation of war which is being prepared at that port, but is it clear that carrying arms or

[1] *L'état neutre désireux de demeurer en paix et amitié avec les belligérants, et de jouir des droits de la neutralité, a le devoir de s'abstenir de prendre à la guerre une part quelconque, par la prestation de secours militaires à l'un des belligérants ou à tous les deux, et de veiller à ce que son territoire ne serve de centre d'organisation ou de point de départ à des expéditions hostiles contre l'un d'eux ou contre tous les deux.* Resolution of the Institute of International Law, 30 August 1875, 1 *Annuaire* 139; *Tableau Général* 1873–1892, p. 162.

ammunition with destination to a belligerent country is taking part in every operation of war which may be afterwards prepared in that country? Or is it not rather a part of general commerce, whenever its connection with a particular operation cannot be pointed out? Evidently the distinction between general commerce and taking part in operations of war or interfering with them, if it is not to be made the starting point of unsatisfactory controversies, must be supplemented by positive rules, owing their obligatory force to general consent. Such are, among others, the rules relating to blockade and the carriage of contraband of war. So also rules are needed to distinguish the things done in a territory which do and do not amount to making use of it for a warlike operation. So far as rules have not been established either by express convention or by practice sufficiently constant to imply consent, neither neutrals nor belligerents can or ought to be prevented from invoking the fundamental principles of the subject, by whatever name they describe them, natural law, *droit primitif*, or justice. And there is no greater need in international law than to bring further parts of the doctrine of neutrality under the dominion of acknowledged rules.

The subject of neutral duties, especially in what concerns naval war, has often been presented as one of conflicting rights. The neutral, it is said, has a right to pursue his commerce as in time of peace, the belligerent has a right which is represented as one of self-preservation, although defeat in war is not necessarily inconsistent with self-preservation; and it is said that the latter is of a higher nature and must prevail[1]. The attempt to establish an order of precedence between these rights in the belligerent's favour, illogical as it is if the terms compared are really rights, betrays a suspicion that the rules which have received general consent lean a little to the belligerent's side, as probably they would be found to do if it were worth while to work them out from abstract considerations. The party who has arms in his hands is in a better position for bargaining than the party who, if he will not concede something, must undergo the painful

[1] *Jus commerciorum æquum est, at hoc æquius tuendæ salutis; est illud gentium jus, hoc naturæ est; est illud privatorum, est hoc regnorum.* Albericus Gentilis, *De jure belli*, l. 1, c. 21.

transition from a state of peace to one of war. In truth the case illustrates the difficulty of starting, in the construction of an ideal or so-called natural system of law, from rights to be secured to the individual man or state. The aggregate possibilities of enjoyment which any such system can furnish are inadequate to meet the demands made on them in the name of rights, and yet no right which has been recognised as primary can consistently be asked to give way to others. The very notion of a precedence among rights supposes some standard by which to judge them, lying deeper than the so-called rights and excluding them from a really primary position. And the result of a system placed on such a basis can only be a working compromise between demands, reached with reference at once to their justice and to the forces behind them, but veiled under a philosophically sounding nomenclature of rights[1].

When a positive rule of international law treats any conduct of a state as incompatible with the duties of neutrality, in a word as unneutral, it binds all the subjects of that state not to contribute to such conduct. But a positive rule of international law may treat certain conduct of an individual as unneutral, allowing the injured belligerent to repress it by action on the individual wherever such action is possible without violating neutral territory, and precluding his neutral state from defending him against such repression, while that state is not called on to join in the repression. This is the case with the rules relating to blockade and contraband of war, which the injured belligerent enforces by action at sea, not to be resented by the state of the offender so long as it is within acknowledged rules, at the same time that states not only do not punish blockade-running and the traffic in contraband but even enforce judicially contracts made for those purposes. The position of an individual who leaves his country in order to enter belligerent service is similar, the other belligerent being entitled to treat him as an unprotected enemy, while no demand is made on neutral states for more than the prevention of such enlistment on their territory as would amount to an unneutral use of it. On such cases

[1] See the section on *The alleged Inherent Rights of States* in the first part of this work—*Peace*—2nd edn., pp. 306–9.

however the question is often raised whether the neutral state's admission that it must not protect its subjects is not such an admission of the wrongfulness of his act as, if carried out to its logical consequences, would require it to prohibit the act and as far as possible prevent it. And it is sometimes further questioned whether the rule which obliges the neutral state to acquiesce in the belligerent's dealing with its offending subject outside neutral territory, even coupled with the general practice of not demanding active repression from that state, amounts to a renunciation of the right to demand such active repression. To these questions it appears to be a sufficient answer that the existing rules as to neutral duties embody a compromise, and that a compromise, unlike a principle, can have no logical consequences; also that where written law or convention is wanting the terms of a compromise must be sought in a practice sufficiently constant to imply consent, and not less in the practice of not demanding active repression by neutral states, because it is negative, than in the positive practice of repression by belligerents outside neutral territory. We therefore, in accordance with the general opinion, hold that a neutral state is not bound by actual international law to prohibit the export of contraband or to take any analogous action in any of the cases now under consideration. But since the opposite opinion is maintained by some jurists, and fits in with the demands sometimes made by belligerents for a benevolent neutrality, it cannot be dismissed without further mention.

"In the society of nations," says Kleen, one of the most eminent of the jurists referred to, "all neutral rights and duties pass through the state as intermediary, the state being the party immediately responsible and having rights." "Every violation of the neutrality of a citizen is at the same time a violation of the neutrality of the state." "Even when international law authorises private persons to act at their risk and peril without directly engaging the responsibility of the state (for instance, according to present usage, in the matters of contraband and blockade), it is always the state which is finally responsible, so that the belligerent *can* claim from the government of the neutral individual that it shall take measures both to prevent the violation of neutrality and to secure its maintenance, by

using its coercive power over its subjects, and demand indemnity if the case requires it[1]." This is an example of the efforts to eliminate individuals from the theory even of those international relations in which they are practically concerned, which date from Rousseau's assertion that states and men are things of such different natures that no true relation can be established between them[2]. The European states which have colonial possessions know well that relations of enmity and neutrality exist between them and natives having nothing which can be treated as state life, with whom therefore they can only deal as with men to be treated with justice. If states please to arrange the duties of neutrality on a footing which allows them to leave their subjects in certain cases face to face with foreign powers, there is merely another instance of a similar kind. Impossibility in fact there is none, and to assert an impossibility in theory, to say that an individual so left to himself is incapable of interfering in a war, and that his acts can receive no legal qualification unless they are first carried up to his state and then down again to himself, is purely arbitrary. It remains true that international law is the law of states, but there is no solid reason why states should not agree by such law that the responsibility for certain acts and their repression shall rest with the individual and the state directly concerned. The only real question is whether they have done so, and of this the proof is similar in its character and equal in its cogency to that of many other international rules.

Starting from the theoretical side, we have arrived at this, that the duties of neutrals flow from the principle that they ought to avoid acts of war as long as they decline to enter on a state of war; that the hopelessness of a complete agreement on theoretical grounds between belligerents and neutrals as to what are acts of war, makes positive rules imperatively necessary; that to a large extent such rules exist; and that some of them, for the sake of peace, throw exclusively on individuals the duties which they prescribe and the responsibility for failure in those duties, recognising in belligerents, to the extent permitted by

[1] Kleen, *Lois et Usages de la Neutralité*, t. 1, pp. 135, 133, 136. "Can" (*peut*) is in italics in the original.

[2] See above, p. 40.

the rules in question, their right of acting directly against all who interfere with their wars without state authority at their back. We have now to trace the development of the subject historically.

History of the Theory of Neutrality.

We have seen something of the mediæval attitude towards neutrality in speaking of the fate experienced by neutral cargoes and ships when involved with enemy ships and cargoes in belligerent captures. The pride and confidence in naval strength which prompted the governments of France and England, and in some measure the Hanse Towns, to reject on that question the rules of the trading communities expressed in the Consolat del Mar, showed themselves as well in other parts of what may be described as the demand that friends should be supporters and not mere spectators. To that demand there also contributed, in countries steeped in feudal ideas, a real difficulty in conceiving any political relations not personal to the rulers, or any personal relations at all not going the full length either of enmity or of declared sympathy if not of alliance. The treaty of 1303 between England and France provided that the enemies of the one should not have from the lands or dominions of the other comfort, succour or aid, whether of armed men or of victuals *or of other things whatever they might be*[1]. Later, neutral trade is denounced in less sweeping terms, but the neutral ruler is induced to lend his own law for its suppression. By a treaty of 1370 the Count of Flanders promises England to take certain measures for preventing his subjects from carrying enemy's goods, and from supplying the enemy with arms, artillery and victuals: the Flemings are then to pass without detention. In case of transgression the count shall have their goods and the punishment of their bodies, but the enemy's goods, and the arms, artillery or victuals being carried to the enemy, shall belong to the King of England and shall be delivered to his agent[2]. Later still, the language of treaties begins to be cut

[1] 2 Rymer, *Fœdera* 927.

[2] 6 Rymer, *Fœdera* 659. By the treaty of 1426, 10 Rymer, *Fœdera* 363, the Duke of Burgundy again promised England to prevent his subjects from carrying enemy's goods, but they were to be believed on their oath.

down by interpretation. Thus, the Scotch being bound by treaties not to minister any kind of aid to the enemies of England, the English government in 1543 claimed that they were thereby prohibited from trading to France in fish, as being victuals, while the Scotch government maintained that the treaties were not broken if their and the enemy's merchants continued their accustomed traffic with such merchandise as they had been used to transport to other countries in time of peace[1].

Besides treaties, the opinions and practice of the different powers as to the restrictions to which they could claim the submission of neutrals found expression in unilateral acts, such as general ordinances, notifications[2], and special instructions to their officers and prize courts. Such were the French ordinance of 1543, giving an enumeration of prohibited articles not including victuals, and the English orders in council of 1587, that some ships at Falmouth should not be allowed to sail if "laden with Spanish preparations, munitions or victuals[3]"—of 1591, that goods "manifestly of the proper natures of victuals and munitions" were to be condemned[4]—and of 1592, directing a sentence by way of compromise in certain pending prize cases because the previous understanding of the law was not clear, but providing for the future that any sort of material fit for sails or for "apparel of men's bodies," though only sometimes and not commonly used for sails, should fall under the prohibition of canvas[5]. Such also was the resolution (*placaat*) of 1599 which the Dutch states-general, whose pretensions equalled those of a feudal sovereign, "made known to all kings and nations, whereby they forbade all merchants to carry to the Spaniards provisions *or any other goods whatsoever*, under the penalty of being treated as enemies[6]." And such again was the *placaat* of the states-general in 1630, by which they declared that the whole coast of

[1] Sir Ralph Sadler's *Letters and Negotiations in Scotland,* p. 381; 2 Twiss 246.

[2] We have had occasion to refer to such notifications or *significationes,* above, p. 142.

[3] Marsden, *Six Centuries of the Admiralty Court,* 67 Nautical Magazine 394.

[4] Ib. 447. [5] Ib. 448.

[6] 2 Twiss 247, quoting Grotius, *Hist. de Rebus Belgicis,* l. 8.

Flanders should be deemed to be under blockade, on the strength of an opinion which they had obtained from the admiralty of Amsterdam that "the rule which obtains in the case of towns, which are properly said to be besieged, and which has with good reason been applied to camps, which are as it were besieged, extends also to the enemy's ports, which when invested by ships are deemed to be besieged[1]." These acts were objectionable so far as they attempted to enforce on neutrals any restrictions not grounded in reason, but they cannot be objected to for their unilateral character, since where no positive rules have become binding by international consent, which was certainly the case at their dates, belligerents cannot be refused the right of taking their stand on the principle that neutrals ought not to participate in a war, and of interpreting that principle as their conscience dictates. At the time, unilateral acts of the nature of those which have been described appear to have carried greater weight even in determining the law than we should now be disposed to concede to similar ones. They had been considered by statesmen before they were issued, and there were few or no independent writers. Hence they attracted to themselves something of that respect which, during the two centuries following Grotius, was attributed to the eminent international jurists whose line he so magnificently inaugurated, and who, whatever their learning or their sincerity, were after all the nationals of some country or other. To this it must be added that even when a unilateral prohibition was in contradiction with the pronouncement of some other state, as we have seen was the case in the article of victuals, the sovereign who uttered it stood in the ideas of the time so immeasurably above the private person on whom he enforced it that the latter, although of another nation, seemed in infringing it to be guilty of an audacity almost wicked[2].

[1] Bynkershoek, *Quæstiones Juris Publici*, i, 11. He mentions the belief that the same opinion had been obtained from private lawyers.

[2] "Albericus Gentilis lays great stress on the fact that Queen Elizabeth had notified to the Hanse confederation not to carry provisions into Spain before she captured their vessels (*Hisp. Adv.*, l. 1, c. 20). And the Protestants are represented by De Thou to have replied to the complaints of the Portuguese, by reason of twenty-five Portuguese vessels having

The mediæval welter of ideas and facts with regard to neutral commerce, which during the sixteenth century was tending to clear itself, may be said to have come to an end with the treaty of Southampton in 1625 and the *placaat* of 1630 above mentioned. The former introduced for contraband and the latter for blockade the period in which we now live, namely one in which these two departments of maritime international law stand out as the subject of positive rules, covering a great area though not even yet completely settled, while outside them neutral maritime commerce is free from belligerent interference. At the same time, as the European monarchies were being defined and consolidated, a class of questions began to come into prominence relating less to the action of individuals than to the public political conduct of states on land as well as at sea. Grotius, whose great work *De jure belli ac pacis* was published in the year of the treaty of Southampton, wrote that "the duty of those who keep aloof from a war is to do nothing by which the one whose cause is bad may be strengthened, or the movements of him who is engaged in a just war may be impeded, but in a doubtful case to treat the two parties equally in allowing passage, in furnishing supplies to their armies, and in abstaining from the relief of besieged forces[1]." Here, failing the benevolent neutrality in favour of the most worthy which Grotius taught as the better part, the standard set up is equality of treatment in the sense of permitting or furnishing to both belligerents the same things which are permitted or furnished to either, without regard to the fact that the passage of troops through neutral territory, coaling a fleet in neutral waters, or any other thing, may mean victory or salvation to the one, while the other may be unable to avail himself of the license or may find it of no value. On the example given by Grotius, the permission of passage, I have said elsewhere: "When private war was a general evil within most mediæval monarchies, a vassal who did not oppose the march of another

been captured bound with cargoes of corn to Spanish ports, *jure belli tales spoliari naves, quippe rem edictis et constitutionibus regiis prohibitam esse.*" Twiss, *Law of Nations—War*, p. 246. And see *est illud privatorum jus, est hoc regnorum*, quoted from Gentilis, *De jure belli*, above, p. 194.

[1] L. 3, c. 17, § 3.

vassal across his fief to attack a third was not deemed to offend against the latter; the assailant was merely using the public ways of the monarchy. So when private war, put down elsewhere, became in Germany public war, it was not there deemed the duty of a neutral to prevent the passage of belligerent forces across his territory[1]." The existence of such a practice must have helped to blind the perception of right with regard to it, and a century later we find Bynkershoek still adhering to equality of treatment as the test of neutral duties[2]. It was reserved for Vattel to pronounce emphatically for entire abstinence from real participation in the war as the true test.

"Let us see," Vattel says, "in what consists the impartiality which a neutral people ought to preserve. It relates exclusively to the war and comprises two things: (1°) Not to give aid when not obliged to it; not to furnish without obligation either troops, arms, ammunition or any thing which is of direct service for the war. I say not to give aid, I do not say to give it equally, because it would be absurd for a state to aid two enemies at once. And more, it would be impossible to do so equally; the same things, the same number of troops, the same quantity of arms, of ammunition &c., furnished in different circumstances are not equivalent aid[3]." The reservation with regard to aid given under an obligation is explained in the next section by saying that "when a sovereign furnishes the moderate aid which he owes by virtue of an old defensive alliance, he does not associate himself with the war; he can therefore acquit himself of his debt and preserve an exact neutrality in other respects. The examples of this are frequent in Europe." It is true that aid so given to a belligerent will not of itself place the sovereign giving it in a state of war—no aid can do so of itself—and that, if given openly and after notice to the other belligerent, it may not involve a want of the sincerity and loyalty due from one who desires to remain a neutral. But it cannot avoid being a

[1] *Chapters on the Principles of International Law*, p. 57.

[2] *Quæst. Jur. Pub.*, l. 1, c. 9.

[3] L. 3, § 104. Buddeus, in his *Elementa Philosophicæ Practicæ*, as quoted by Nys—*Le Droit International*, t. 3, p. 563—comes near to this, and makes the same reservation of aid which a neutral is authorised to furnish by a particular engagement.

real participation in the war, and the fact that the neutral had entangled himself by an alliance under which it was due cannot take from the other belligerent the right to insist that those who participate in the war shall share its responsibilities, and therefore of declaring war against the neutral who has intervened[1].

To return, however, to the former quotation, Vattel, in describing the two things comprised in true neutral impartiality, proceeds: "(2°) In every thing which does not relate to the war, a neutral and impartial nation will not refuse to one of the parties, by reason of their then quarrel, that which it grants to the other. This does not deprive it of the liberty to direct itself with a view to the greatest good of the state, in its negotiations, in the friendships which it contracts, and in its commerce. When this reason leads it to preferences in things of which every one has the free disposition, it only uses its right. There is no partiality in that. But if it were to refuse any of these things to one of the parties only because it is at war with the other, and in order to favour the former, it would no longer be observing an exact neutrality." This doctrine belongs to the region of politics, in which it is no more possible to define when the conduct of a neutral becomes justly intolerable than it is to define when the conduct of a foreign power in time of peace becomes justly intolerable. But the things to which Vattel in his (2°) no doubt intended to refer include much that relates to the use made of neutral territory, on which the doctrine is gradually passing from the region of politics to that of law, in proportion as rules are consented to under a growing sensitiveness as to what is really a participation in military operations. So far as it remains within the former region, the stress which Vattel lays on motive ought to be accompanied by a caution as to the uncertainty always attaching to suspicions of the motives of others. Still, his doctrine finds a justification in the important bearing which the neutral's motive has on the expectation which ought to be formed of his ulterior conduct, and the effect of that consideration will not always be to stimulate a belligerent to extreme measures. For instance, when France in 1905 extended in her colonies great hospitality to the Russian fleet on

[1] See the note at end of the chapter.

its way to the Far East, the behaviour of Japan must have been influenced by the persuasion that the French motive was friendship for Russia, which would have its limits in action, and not enmity to Japan. The value which governments attach to having at their disposal the means of promoting their political objects, by showing favours not involving a breach of recognised international rules, is one of the causes that have retarded the formation of such rules in what relates to the use of territory, as compared with their advanced condition in what relates to blockade and contraband. But in leaving that branch of the subject as open as it is, the risk is run that in the absence of such rules a power which feels itself to be injured may claim to fall back on principles, as the United States successfully did in the *Alabama* case.

After Vattel what chiefly remained to be supplied, in order to bring the notion of real participation in war to the degree of clearness which it has now attained, was to throw further light, from a general point of view, on the distinction between what may and may not be done in neutral territory; and important help was given in this by the appeal of Jefferson, Secretary of State of the United States under Washington as president, to the misuse or usurpation of the neutral's sovereignty as a consideration to be taken into account. It was occasioned by the incidents which occurred in America on the outbreak of the war of 1793 between England and France. To M. Genêt, the French minister in the United States, who pleaded that to grant commissions and letters of marque was one of the usual functions of French consuls in foreign ports, Jefferson wrote, 5 June 1793: "It is the right of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the duty of a neutral nation to prohibit such as would injure one of the warring powers. The granting military commissions within the United States by any other authority than their own is an infringement of their sovereignty, and particularly so when granted to their own citizens, to lead them to commit acts contrary to the duties they owe to their country[1]." And to Mr Morris, the United States minister at Paris, he wrote, 16 August

[1] 1 *American State Papers* 67.

1793: "The right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power or person can levy men within its territory without its consent. If the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right and to prohibit such armaments and enlistments[1]."

The distinction to which Jefferson points is that between the things of which, by the general usage of European and American nations, a state reserves to itself the exclusive performance within its territory, and those which the same usage allows to be done by private persons; and it would be unfair to interpret him without reference to that distinction. It is within the right of a state to reserve to itself the exclusive performance of any thing, but that does not give a belligerent the right to claim that whatever may be obnoxious to him shall not only not be done by a neutral state but shall be prohibited by that state to individuals. A belligerent however must plan his operations on the footing of what general usage leads him to expect to find in well-governed countries, and a neutral must not falsify the reasonable expectations which he so forms. It is often put that a belligerent cannot complain of commercial acts done in neutral territory by private persons, whatever their effect on the fortunes of the war. And this is true, only those who desire that the export of contraband, for example, shall be prohibited by neutral states will deny that such export is a purely commercial act. It would be difficult better to define a purely commercial act than as one containing no element of what is generally reserved for public action. Again, any act amounting to participation in a specific operation of war would certainly be one of those generally reserved for public action. We may say then that the question whether an act falls within the popular notion of a commercial act, the question whether it is a participation in a specific operation of war, and the question whether it is one of those generally reserved for state activity, furnish three lines of enquiry for determining whether it ought

[1] Ib., p. 116.

to be prohibited to private persons on neutral territory; that those lines will usually be found to lead to coincident results; but that if either the second or the third question be answered in the affirmative, the act must certainly be prohibited. And to this it must be added that since a well-governed state does not perform commercial acts except incidentally to the performance of its public duties, as in the sale of old stores, abstinence from such acts is not such a burden to it as any unfairly demanded abstinence from them would be to private persons to whom they are their living. It would therefore be highly objectionable, as an unfriendly proceeding, that a public authority should sell arms or ammunition, or lend money, to a belligerent, even when such sale or loan was within its usual course, and could not be regarded as a participation in a specific operation of war.

Note on Aid in War given in pursuance of a Treaty by a Power claiming to continue a Neutral.

It follows from what has been said above[1] that the question raised by the aid given to a belligerent by a neutral who in Vattel's language "is obliged to it" is a political one, its legal aspect, if the other belligerent chooses to insist on it, being clear. But since it figures in works on international law, it will be worth while to mention some cases of dates posterior to that of Vattel.

Russia being at war with Sweden, Denmark, in compliance with a treaty of defensive alliance, placed certain land and sea forces at her disposal. Sweden stated that if those forces acted against her in Russian provinces and waters she would not consider the peace to have been broken by Denmark, but that she would do so if they invaded Swedish territories: 11 September 1788. Denmark rejected any limitation of the sphere of their operations, and claimed to remain at peace so long as the troops and ships employed by her in the war should not exceed the force stipulated: 13 September. The Danish contingent invaded Sweden on 23 September. England, Prussia and Holland having offered their mediation, Sweden consented to regard the peace as subsisting in order to see what success the negotiations would have: 5 October. Prussia declared that in attacking

[1] Pp. 202, 203.

Sweden when her principal forces were employed elsewhere, with a direct tendency to crush the king of Sweden and change the form of government of that country, Denmark had far overstepped the part of an auxiliary; and that if she did not evacuate Sweden and conclude an armistice, Prussian and Hanoverian troops would occupy Holstein and Sleswick. Thereupon the king of Denmark ordered the evacuation of Sweden, 24 October; and on 5 November concluded an armistice, guaranteed by England and Prussia, to last till 13 May 1789. Russia having refused the mediation, the three mediators declared that Denmark was freed from the case of a defensive treaty, and that the junction of any of her forces with those of Russia would make her a belligerent, in which case they threatened to assist Sweden: 23 April. Denmark claimed to be allowed, before giving a definitive answer, to consult Russia, which she said had an incontestable right to demand the fulfilment of her engagements: 30 April. With the permission of Russia, Denmark promised to observe a neutrality during the continuance of the war: 9 July 1789[1]. It thus appears that England, Prussia and Holland—Russia need not be counted, being directly interested—considered that Sweden would have no legitimate ground of complaint so long as the aid given by Denmark to Russia in pursuance of a treaty should be confined within limits, as to which however they, Sweden, and Denmark were not in agreement. The want of agreement on that point emphasizes the conclusion that it was not a legal question but one of political legitimacy that was dealt with.

In 1803 and 1804 England considered that, not the succour which Spain was bound by her treaty of 1796 to give to France, but any excess of succour over what was stipulated in that treaty, would be a cause of war with Spain[2].

Canning, on the occasion of his assisting Portugal against Spain in 1826 in pursuance of old treaties, drew a distinction between a general prospective defensive alliance and a defensive alliance concluded with a power either actually at war or on the eve of a rupture with a third power[3].

[1] Martens, 1 *Causes Célèbres* 308–332.

[2] Mahan's *Sea Power, 1793–1812,* vol. 2, p. 134.

[3] Stapleton's *George Canning and his Times,* p. 535.

CHAPTER VIII.

DUTIES OF NEUTRAL STATES.

National Laws on the Subject.

In this chapter we propose to trace in detail the duties which are incumbent on neutral states, whether with regard to their own action as states, or with regard to such action of individuals as it is their duty to repress because it would amount to a violation of the neutrality of their territory. The latter point has given occasion in the United States and Great Britain to enactments covering so large a part of the whole subject, and necessarily exercising such a dominant influence on the views of American and British lawyers, that it will be convenient to take as much of the subject as we can in the order in which it appears in the latest British statute, which is called the Foreign Enlistment Act 1870, by a name derived from one of its branches and giving no adequate notion of its comprehensive character. First of all, however, it will be well to state how the series of enactments referred to arose.

In 1793, during the war between England and France, Gideon Henfield, a citizen of the United States, took service on board a French privateer, and arrived at Philadelphia as prize-master of a British ship captured by her. He was indicted under the common law, and Mr Justice Wilson charged the jury that Henfield was bound to act no part which could injure his country, and was therefore bound to keep the peace towards all nations at peace with it. To that common law doctrine he added the constitutional argument that the treaties of the United States were part of the law of the land, and that a treaty of friendship existed between them and England. The

jury, after retiring several times, returned a verdict of "not guilty." Congress, thus warned of the difficulty which political sentiment might at any time place in the way of executing the law as it stood, passed the Neutrality Act of 1794 at the instance of Washington and Jefferson. This act was strengthened in 1818 in consequence of the Spanish American wars of independence, and the whole enactment now stands as one, under the head of Neutrality in the Revised Statutes of the United States. In consequence of the same wars of independence, which strongly stimulated political sympathy and commercial enterprise on both sides of the Atlantic, the first British statute on the subject was passed in 1819. The one now in force, replacing it and more stringent, was passed in 1870 in consequence of the incidents which took place during the War of Secession in the United States. On all these enactments it will be one of the matters for our consideration whether any particular provision does not go beyond what neutral duty requires. Whether in fact it does so or not, at least it is certain that no state law of the kind is a declaration to the world of what the state in question deems to be its international duty as a neutral. It is a declaration to its own subjects of the powers which it deems necessary to take over them, whether in pursuance of its own policy or in order to ensure the performance of its neutral duty; and even when no policy except such performance is concerned, the powers taken may well exceed the minimum which would be compatible with the duty. Laws often fail of their intended effect through oversight or tardiness in their administration, and the higher the standard at which they aim in the matters before us, the less likely will such slips be to bring their execution below the standard necessary for the safety and ease of the foreign relations of the state. It is true that any national enactment, whether exceeding or not the limits of international duty, must be enforced in favour of both belligerents if it is enforced in favour of either. A neutral must be impartial, though it is not enough that he should be impartial if he does not abstain from participation in the war. But he is within his right if he declines to enforce in favour of either belligerent an enactment with which he has armed himself only in pursuance of his own policy or for his own greater security.

We shall now treat of the repression by states of the unneutral action of individuals under the three heads of the Foreign Enlistment Act 1870, *Illegal Enlistment*, *Illegal Shipbuilding and Illegal Expeditions*, which we shall divide, and *Illegal Prize*. Lastly will come the duties of a state with regard to its own action, and with regard to any action by private persons which a state must not allow in its territory, but which in England and the United States it has not been found necessary to regulate by statute.

Illegal Enlistment.

Creating or recruiting a force to be employed in a war is clearly an operation of that war; and when it is done on neutral soil, either by a belligerent power or by private sympathisers, it is clearly a usurpation of the authority of the neutral state by or on behalf of the belligerent. On both grounds therefore it is a neutral duty of that state not to permit in its territory any thing which forms or is intended to form a part of such creation or recruiting of a force, even though it be only the enlisting of a single recruit. To enlist more, and to drill, arm and organise them, would merely be to take further steps in the same line of conduct. But that a subject, not enlisted, should go abroad with the intention of entering belligerent service would not of itself involve his state, in the territory of which nothing illegitimate would have been done, although an agency, opened or carried on within the territory for encouraging such departures in search of service, would only be a colourable avoidance of enlistment on the soil, and its case could not properly be distinguished from that of actual enlistment. All this is now generally recognised, not even Switzerland consenting any longer to furnish the recruiting-ground which she formerly supplied. Belligerent subjects who go home to perform their military duties do not fall within the scope of this doctrine. Their obligation has not been formed within the neutral territory which they leave, and it justifies their intention to take part in their country's service. Their consuls assist without offence in making the necessary arrangements for their return.

There being a civil war in Portugal between the partisans of

Don Miguel and Dona Maria, the latter of whom had the sympathy of the Liberal party in Western Europe, some of her troops, flying from Oporto, took refuge first in Spain and afterwards in England. There they were joined by other troops which had been engaged in Germany and the Netherlands, were sustained and supported by the English creditors of Dona Maria's Government, and were commanded as a body by General Stubbs. Don Pedro, the emperor of Brazil, supported the cause of his daughter Dona Maria, and his minister informed the Duke of Wellington, the English prime minister, that he intended to despatch a part of the troops in question to the Azores, where the island of Terceira still held out for her. Wellington answered that he could not recognise foreign troops in England, and that, if there were any such, they must instantly disperse and distribute themselves in the neighbouring towns; and that they would not be permitted to go in hostility to any part of the Portuguese dominions, but that they might proceed as individuals to the Azores if they pleased. The English sympathisers objecting that the men were harmless, as they were unarmed, Lord Chancellor Lyndhurst said in the House of Lords that "that argument was altogether untenable, because, as they were organised, they had no right to go there" [to the Azores][1].

The provisions of the Foreign Enlistment Act 1870 against enlisting in the active sense of that verb are that it is penal for any one, whether a British subject or not, without the royal license and within the British dominions, to induce any person (*a*) to accept or agree to accept any commission or engagement in the military or naval service of a foreign state at war with any foreign state at peace with the king (s. 4), or (*b*) to quit, or to go on board any ship with a view of quitting, the British dominions with intent to accept any such commission or engagement (s. 5); also that it is penal to induce any person to quit the British dominions, or to embark in any ship within the British dominions, under a misrepresentation or false representation of the service in which he is to be engaged, with the intent or in order that he may accept or agree to accept any

[1] *Hansard, N. S.*, xxiii., 778: see also 746, 747, 768–9. Later we shall see the further development of this Terceira affair.

such commission or engagement as aforesaid (s. 7). The provisions against enlisting in the passive or neutral sense of that verb apply to British subjects only, and are that it is penal for them, without the royal license and whether within or without the British dominions, to accept or agree to accept any commission or engagement in the military or naval service of a foreign state at war with any foreign state at peace with the king (s. 4); and without the royal license to quit, or to go on board any ship with a view of quitting, the British dominions, with intent to accept any such commission or engagement (s. 5). So far as these provisions control the action of British subjects outside the British dominions, it may be said, without controverting their political wisdom, that they are not required by the state's neutrality. And a provision against going abroad in order to enter foreign service hostile to a friendly state would not be required by the state's neutrality in the case of an isolated individual, but is useful for more certainly preventing what, if done by many individuals in combination, might amount to the departure of an expedition. Then s. 7 makes it penal for the masters or owners of ships to have or to engage to take on board, without the royal license and within the British dominions, British subjects who have been enlisted or are about to quit the British dominions, or persons who have been induced to embark, contrary to s. 4, 5 or 6; and "all illegally enlisted persons shall immediately on the discovery of the offence be taken on shore, and shall not be allowed to return to the ship." The act contains a proviso exempting from penalties persons who enter the military service of any Asiatic potentate with the license for the time being required by law (s. 33); and the interpretation clause (s. 30) puts on "foreign state" a meaning which includes parties to civil wars, so that the royal license became necessary for the formation in England of the Spanish legion, so called, which assisted under the Quadruple Alliance of 1834 in the overthrow of the Carlists in Spain.

The neutrality laws of the United States make it penal for their citizens to accept and exercise within their territory a commission to serve in war, by land or by sea, a foreign prince, state, colony, district or people against any prince, state, colony, district or people with whom the United States are at peace.

They also make it penal if within the territory any one, whether citizen or alien, enters, or hires or retains any one to enter or to go abroad with the intent of entering, the military or naval service of any foreign prince, state, colony, district or people, whether or not at war with another which is at peace with the United States. This prohibition is qualified by a proviso under which friendly ships of war or privateers, which at the time of their arrival in the United States were fitted and equipped as such, may enlist persons of their own nationality, being "transiently" within the United States, for service on board. So far as the law thus described applies to the time of peace, it furnishes another example of a national law dictated by policy and not by neutral duty. The United States law contains no provision for its relaxation by government license, and the penalty enacted by it is fine and imprisonment, while that enacted by the British law is fine and imprisonment or either, at the discretion of the court.

Illegal Shipbuilding.

When the war of the French revolution compelled the jurists of the United States, in their respective capacities of legislators and judges, to seek the right footing on which to place the law of their country with reference to its neutral duties, it was clear to them that a ship, considered in herself, however adapted she might be for war, was merely a contraband article, which a belligerent might capture as such but the trade in which it was no part of neutral duty for a state to prohibit. But the circumstances in which she set out from a neutral port might involve her in a question different from that of contraband, namely the use made of neutral territory, and for appreciating those circumstances they resorted to the legal doctrine of intent. You can intend your own actions, and you can identify yourself with another person's intention of his actions by knowingly assisting him in their performance. The actions of others with which you have not so identified yourself you may foresee with more or less certainty, and the expectation which you form of them may be your motive, but neither expectation nor motive makes their action yours. When a ship or a cargo of arms is despatched by

a neutral owner in search of a market, his motive is the expectation that it will find a belligerent purchaser who will use it in war, but the intent so to use it can only be formed by the purchaser, and remains contingent as long as the expectation exists, so that the expectation is not an assistance knowingly given to it. But when a ship is despatched from a neutral port by a belligerent owner, his intent to employ her in war has been formed while she was still in neutral territory, so that her despatch is an act of war and a usurpation of the neutral state's authority, and any one who has contracted with the belligerent owner or worked for him about the ship with knowledge of his intent has identified himself with it. Thus the line between the export of contraband and the abuse of neutral territory is drawn by the intent of unneutral employment, formed within the territory by a person whose position in relation to the thing enables him to give effect to it. And so Channell, B., interpreting the Foreign Enlistment Act of 1819 with reference to the *Alexandra*, asserted by the crown to be in building for the Confederate States as a cruiser, said: "It is, I think, agreed on both sides that the intent spoken of must be the intent of some person who has control over the vessel so as to be able to carry out his intent or purpose[1]."

The line thus drawn is consistently carried out in the Neutrality Laws of the United States, in which country building ships and sending them abroad in search of a market in time of war was then a not unimportant branch of industry. Now the increased size and cost of ships of war, the variety of their designs with the consequent importance of their being laid down to suit the party to be served, and the absence of any use for ships fitted for war in private hands, which has resulted from

[1] In *Att. Gen. v. Sillem*, 2 H. & C. 552. The difference between expectation and intent is illustrated by the cases on contracts made abroad for goods to be smuggled into England. The seller was allowed to recover their price where the delivery of the goods was complete abroad, and nothing was done by him to assist in the smuggling, though he knew that such was the buyer's intention: *Holman v. Johnson*, Cowp. 341; *Pellecat v. Angell*, 2 Cr. M. & R. 311. But he could not recover where he had packed the goods in a peculiar manner for the purpose of smuggling: *Biggs v. Lawrence* 3 T. R. 454; *Clugas v. Penaluna*, 4 T. R. 466; *Waymell v. Read*, 5 T. R. 599. See Westlake, *Private International Law*, 5th ed., p. 308.

the abolition of privateering, have practically limited the building them in private yards to building to the orders of governments. Still the American and British laws on the subject require to be thoroughly appreciated, and we will take, first, the material thing or act which they contemplate, and secondly, the state of mind in which they make it criminal to do that thing or act. First the material part of the offence stands in the Foreign Enlistment Act 1870 as building a ship or agreeing or causing her to be built, equipping her, despatching her or causing or allowing her to be despatched, or issuing or delivering any commission for her (s. 8). And the interpretation clause (s. 30) gives meanings to building and equipping which include any thing done towards either of those ends, whereby the interpretation put on the Act of 1819 in the case of the *Alexandra*[1], that the equipment must be such as would enable the ship to cruise or commit hostilities immediately on leaving port, was prevented for the future. And rightly so, for without being in a condition to fight a naval action a ship may be able to take part in some operation of war, for instance she might capture a merchantman with the small arms of her crew alone. The American law was not open to the objection which in England was remedied in 1870, since it contains the words "attempt to fit out and arm," on which it was held that "the attempt does not imply a completion of the act, or any definite progress towards it[2]." It will be noticed that the phrase "fit out and arm" corresponds to the "equip" of the British law, but the description of the material offence in the two countries is substantially equivalent, it being quite immaterial that the American law does not use the word "despatching."

Coming now to the criminal state of mind, the United States Neutrality Laws prohibit every one from committing the material offence within the territory "with intent" that the ship shall be employed in foreign service against friends[3], and they

[1] *Att. Gen. v. Sillem*, 2 H. & C. 431. The court was equally divided, Pollock, C. B., and Bramwell, B., being for the restrictive interpretation, Channell, B., and Pigott, B., against it, so that the indictment fell to the ground.

[2] *U. S. v. Quincy*, 6 Peters 445, Scott 706.

[3] In the language here abbreviated as "friends," as well as in that

prohibit any one from being "knowingly concerned" in it within the territory when committed with such intent. This simple wording covered all cases in which the intent might be formed by some one having the control of the ship, whether a foreign belligerent having her built to order or an American citizen designing to use her as a privateer or in the kind of hostility called filibustering, but it did not cover building ships to be sent in search of a market; and it corresponded accurately with a proviso that "the owners or consignees of every armed ship or vessel sailing out of the ports of the United States, belonging wholly or in part to citizens thereof," shall give bonds with sufficient sureties that she "shall not be employed *by such owners* to cruise or commit hostilities against" friends[1]. But the Foreign Enlistment Act 1870 makes the criminal state of mind to be doing the thing "with intent or knowledge, or having reasonable cause to believe," that the ship will be employed in foreign service against friends. The "reasonable cause to believe" was added in 1870 to the enactment of 1819, and brings building and despatching for a market within the act, since the intending vendor would have reasonable cause to believe that he would find a purchaser who would make the noxious use of the ship. With a view, however, to the trade of building ships to order being carried on in time of peace with reasonable security, the Foreign Enlistment Act 1870 contains in s. 8 a proviso exempting from penalty the building or equipping a ship in pursuance of a contract made before the commencement of any war in which she is intended or expected to be employed, if full notice of the facts is given to a secretary of state forthwith on a proclamation of neutrality being issued by the crown, and if the secretary of state be satisfied in respect of security to be given and measures to be taken for ensuring that the ship shall not be despatched, delivered or removed without the royal license before the end of the war. In the United States, if similar conduct were pursued

describing the service, the words "colony, district or people" were added in 1818, in order to make the attitude of the United States towards wars of insurrection the same as towards wars between recognised states.

[1] Revised Statutes, s. 5289.

in a similar case by the builder or equipper of a ship, it would evidently be sufficient of itself to negative an imputation of criminal intent.

The legislation of the United States has been consistently carried out by their courts, three leading cases in which it is desirable to mention with some particularity, since they were all prior to the arbitration at Geneva on the *Alabama* claims, and the doctrine laid down in them appears still to furnish a correct standard so far as it concerns neutral duty in the points in question. In the case of *The Santissima Trinidad*[1] a ship which had been employed as a privateer in the war of 1812 against England was sent in search of a market, armed with twelve guns and loaded with munitions of war, to Buenos Ayres, then in insurrection against Spain. There she passed into the possession of the insurgent government and received the name of the *Independencia*, after which she returned to the United States, substantially increased her crew in one of their ports by illegal enlistments in violation of their neutrality, and on the same cruise on which she left with her force so increased captured at sea the *Santissima Trinidad* and brought her into a United States port. The American court, of which Story delivered the judgment, released the prize because of the illegally augmented force with which she had been taken, but the original armament and despatch of the *Independencia* they held to have been a commercial adventure, exposing her to the risk of capture as contraband during her voyage to Buenos Ayres, but not violating the neutrality of the United States. The distinction between the despatch of a ship as contraband and as an unlawful expedition did not depend on her being armed.

In *United States v. Quincy*[2] the *Bolivar* was sent from Baltimore to the Danish and equally neutral island of St Thomas, with some view, the exact nature of which was disputed, to her acting as a privateer in favour of the insurgent Spanish colonies. Quincy being indicted for this under the Neutrality Laws, the court, consistently with the case of *The Santissima Trinidad*, refused to instruct the jury that the defendant must be acquitted if the *Bolivar* when she left

[1] 7 Wheaton 283, Scott 701.

[2] 6 Peters 445, Scott 706.

Baltimore, and during her voyage to St Thomas, was not in a condition to commit hostilities. As the presence of armament was not conclusive that the despatch of a ship was an unlawful expedition, so its absence was not conclusive that her despatch was merely an export of contraband. But the court instructed the jury on the one hand that the defendant must be acquitted if while in the United States he had no present or fixed intention to employ the *Bolivar* as a privateer, but only had a wish so to employ her if he could obtain funds in the West Indies for arming and preparing her, his intent in going to St Thomas being to seek funds for that purpose—and on the other hand that "if the defendant was knowingly concerned in fitting out the *Bolivar* within the United States with the intent that she should be employed as set forth in the indictment, that intention being defeated by what might afterwards take place in the West Indies would not purge the offence which was previously consummated. It is not necessary that the design or intention should be carried into execution in order to constitute the offence." On the latter part of this ruling it must be remarked that however wise it may be for a state to punish in their inception designs conceived for the violation of its neutrality, international offence can scarcely arise from a design defeated before receiving any execution.

In the third of the cases above referred to, that of *The Meteor*[1], a ship had been built in the United States in 1865, during a war between Chile and Spain, and proceedings were taken against her by the government before she could leave. Judge Betts in the lower court and Judge Nelson in the higher differed as to whether what was done by her owners towards despatching her was done in pursuance of an arrangement between them and the agents of Chile for her sale to that state, which would employ her in hostilities against Spain, or whether the negotiation for a sale to Chile had failed, and the owners had thenceforward no other purpose than to send her to a South American port in search of a market. But neither court doubted that such was the question on which the case depended.

The claims of the United States against Great Britain,

[1] 3 Wharton's Digest 561, Scott 711.

growing out of the acts of the ships which were despatched from Great Britain for the service of the Confederate States during the War of Secession, and generally known as the *Alabama* claims, were referred to arbitration by the treaty of Washington, 1871. That treaty provided, Art. 6, that "in deciding the matters submitted to the arbitrators they shall be governed by the following three rules, which are agreed upon by the high contracting parties as rules to be taken as applicable to the case, and by such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case." And after a declaration by the British government that it did not assent to those rules as a statement of the principles of international law which were in force at the time when the claims arose, the article proceeded: "The high contracting parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime powers and to invite them to accede to them." The first of what may be called the three *Alabama* rules ran thus:

> A neutral government is bound, First: To use due diligence to prevent the fitting out, arming or equipping within its jurisdiction of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

This rule, in enjoining on a state to use due diligence to prevent certain violations of its neutrality, does only what elementary common sense requires as soon as the things struck at are admitted to be violations of neutrality. Indeed it is rather favourable to the neutral state, indicating as it does that neutrality must not be construed as an insurance against every thing inconsistent with it, when there has been no failure in a reasonable endeavour to prevent any such inconsistency. In describing the violation of neutrality which due diligence is to be used in preventing, the rule follows the United States Neutrality Laws and the Foreign Enlistment Act 1870 in making it, substantially, the augmentation in neutral territory of the naval strength of a belligerent power. Sir Alexander

Cockburn, as the British arbitrator in the *Alabama* case, said that "it is the present intention of the immediate employment of the vessel for hostile purposes which makes the sending out an armed ship an offence against the law of nations." The word "immediate" marks the difference between that view and the view adopted in the rule; and on the same principle, which was that of the deciding half of the court of Exchequer in the case of the *Alexandra*[1], Sir Alexander required officers and a fighting crew, equipment and armament, for a ship the departure of which should constitute the offence. But with this view we cannot agree. No international attempt to lay down a precise rule is in favour of it, and in the absence of a precise rule generally agreed on a belligerent has the right to fall back on the fundamental principles of the subject, which raise no question of limit or degree when pointing out that a neutral who permits a belligerent to receive an augmentation of naval strength within his territory is a participant in the war.

For the rest, the first *Alabama* rule mentions "reasonable ground to believe," but as a state of mind of the neutral government, not of the culpable individual as the Foreign Enlistment Act 1870 mentions it, and therefore does not strike at building or despatching a ship of war in search of a market, could such a proceeding be now contemplated as possible. If the government has reasonable ground to believe that a culpable intent exists, it must not wait idly till the proof of it would satisfy a court of law, or it will be likely to have stirred itself too late, and it should therefore arm itself with the powers necessary for acting in time. This has been done for the British dominions by sections 23 and 24 of the Foreign Enlistment Act 1870, which provide that on having reasonable and probable cause for believing that a ship is being built or is about to be despatched contrary to the act, the secretary of state or the chief executive authority of the British dominion concerned may, and the local authority must, detain the ship. The matter is then to be put in course of trial in the Court of Admiralty, the burden of proof that nothing contrary to the act was being done or intended lying on the owner, an indemnity to whom may be ordered by the court where justice so requires.

[1] See above, p. 215.

The augmentation in a neutral port of the naval strength of a belligerent power can take place as well by augmenting the strength of one of its own ships as by building a new one for it. The legal character of both operations depends on the same principles, and the former is dealt with under the head of Shipbuilding in the Foreign Enlistment Act 1870, s. 10 of which imposes fine and imprisonment or either, at the discretion of the court, on any person who, within the British dominions and without the license of the crown,

> By adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of [His] Majesty was a ship in the military or naval service of any foreign state at war with any friendly state.

Illegal Expeditions.

The subject of expeditions directed against a belligerent power from a neutral port, having been either originally formed there or augmented there in force after having put into it, is touched on in that part of the first *Alabama* rule which deals with the departure of ships from neutral jurisdiction. This was inevitable, although that rule seems to have been primarily designed to deal with the equipment of ships in neutral territory, because we have seen that the unneutral character of such equipment depends on an intent about what is to follow the departure of the ship. The second *Alabama* rule directly attacks the question of illegal expeditions and, with the third rule, is in these terms:

> [A neutral government is bound] Secondly, Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.
>
> Thirdly, To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligation and duties.

These two rules seem to have been designed to be specially taken together, since the first rule, in which due diligence is incorporated, did not need its repetition in the third. Some

doubt has been felt whether "base of operations" in the second rule was not intended to refer to a base used for large or repeated operations, the departure of a single ship from a neutral port having been dealt with in the first rule. But the term "base" does not in itself carry any implication as to the importance or number of the operations proceeding from it, and the principle is the same whether an expedition consists of a fleet or of a single ship. Nay, more, the principle is the same for expeditions starting from land or from sea frontiers. The departure of a force from either with belligerent intent is a matter which in every country is reserved for the public authority, and any private person or foreign government which presumes to despatch a force with such an intent usurps that authority, and involves the territorial government which permits such a usurpation in the charge of participating in the war. We are then entitled to omit the word "naval" from the second *Alabama* rule, and to expand "ports and waters" into "territory." We have it thus as a general rule that "a neutral government is bound not to permit either belligerent to make use of its territory as the base of operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men."

The Foreign Enlistment Act 1870 enacts as follows:

> Sect. 11. If any person within the limits of H.M.'s dominions, and without the license of H.M., prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue:
>
> (1) Every person engaged in such preparation or fitting out or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this act, and shall be punishable by fine or imprisonment or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.
>
> (2) All ships and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to H.M.

Common to this and to the enactments about illegal shipbuilding are the extension of "state" by the interpretation clause to include any persons exercising or assuming to exercise the powers of government, and

Sect. 12. Any person who aids, abets, counsels or procures the commission of any offence against this act shall be liable to be tried and punished as a principal offender.

A difficulty in the practical application of the doctrine as to illegal expeditions has been sometimes felt to arise when the elements of an expedition, such as ships, men and arms, are despatched from a neutral territory separately and are combined outside its limits. It would indeed be difficult to hold that the fact of combination gave a non-commercial character, in violation of neutrality, to something of which the separate elements were all of a merely commercial character; but such a case could scarcely occur in reality. If what results from the combination is a military force inspired by a belligerent intent, it can hardly be but that at least some of its elements must have been despatched from the neutral territory with that intent, so as to give to their despatch an unneutral character which, as we have seen, does not depend on the completeness of the belligerent preparations. In the case of the *Terceira* expedition in 1829, which we have already had to notice with regard to the collection and organisation of the men in England, the men sailed from Plymouth unarmed with false clearances for Brazil, the government not opposing their embarcation in consequence of an assurance given by the Brazilian minister that they were being sent to Brazil. But since the government knew that arms from England awaited them at or near Terceira, it suspected their true destination and despatched a force instructed to prevent their landing there, which it accordingly did. In the House of Commons Horace Twiss defended the action of the government by saying that "if at the end of the voyage the arms were to come into the soldiers' hands, it is no more than if the arms had come in a different vessel of the flotilla[1]." But Huskisson quoted Canning as saying that "it is only when the elements of armaments are combined that they come within the purview of the law, and if that combination does not take place till they have left this country we have no right to interfere with them[2]." Canning on the occasion so referred to was answering a complaint of Turkey about ships and other things said to have

[1] *Hansard, N. S.*, xxiv, col. 165. [2] Ib., col. 209.

been supplied to the insurgent Greeks, and it is possible that nothing took place in England that did not come fairly within the description of the export of contraband, so that one of the rare cases may have been presented in which an unneutral combination of elements furnishes no ground of reproach against a country from which some of those elements have been derived. In the *Terceira* affair there can be no doubt that the collection and organisation of the men in England and their despatch from a British port were important steps taken on British soil in execution of a belligerent intent there formed, and on the true principles of neutrality were sufficient in themselves to oblige the British government to exert itself for the frustration of that intent, although the foreseen combination with arms was appealed to in support of that action. Indeed the distinction between the export of contraband and illegal expeditions does not seem to have been clear to any one in England till the *Alabama* cases forced it into recognition. In those cases Sir Alexander Cockburn, as arbitrator, took what may be described as an intermediate view. We have seen that he held a fighting crew and armament necessary to constitute an unneutral naval expedition, but at the same time he admitted that where such an expedition was developed outside a given neutral territory, that territory might be affected by having furnished its elements. With the deference due, I am unable to see how a territory can be affected unless, within it, both an unneutral intent has been entertained and a sufficient act committed in pursuance of that intent.

The Foreign Enlistment Act 1870 places British law on a level with international requirements with relation to the elements combined to form an expedition. Sandoval purchased in England two Krupp guns and a quantity of ammunition, and sent them in a trading ship to Antwerp, where they were placed on board another ship, the *Justitia*, of which Sandoval took the command; and the expedition thus completed proceeded to America, and fought on the side of the insurgents in a civil contest which was raging in the republic of Venezuela. Sandoval reappeared in England, where he was tried, and sentenced on a finding by the jury that when he purchased the arms and ammunition he knew and expressly intended that they

should form part of a naval expedition which was being prepared to proceed against a foreign friendly state[1].

In this place it will be convenient to wind up what we have to say on that part of the Foreign Enlistment Act 1870 which relates to shipbuilding and expeditions by mentioning some of the decisions on it and on the older British and United States laws. During the Franco-German war the despatch of a tug from Dover, on an engagement made with the French consul there to tow a French prize to Dunkirk Roads, was held to be illegal, and the tug was forfeited to the crown[2]. Thus neither fighting nor readiness to fight was made the exclusive test of an unneutral expedition. During the same war it was held that the despatch of a specially constructed vessel, carrying telegraph wires which an English company had contracted with the French government to lay down in France for completing the communication between two French fortresses, Dunkirk and Verdun, was innocent, her business being purely commercial although the lines to be laid might be partially used for military purposes[3]. The only intent with which the English company could fairly be identified was that of adding to the telegraphic system of France, which could not be made a participation in the war either by the fact that the addition, like the rest of the system, would be liable to military use, or by the fact that such use was the motive for which the French government desired to make the addition at that time.

But service as a transport or storeship was held under the act of 1819 to be military service[4]. And quite correctly from the international point of view, which also may be said of the American decision that converting a merchant ship into a ship of war must be deemed an original outfit[5]. In the case in question the ship's armament was added to, but it would have been sufficient that her destination was changed, for the court

[1] *Reg. v. Sandoval*, 56 L. T. 526, 16 Cox C. C. 206, 3 T. L. R. 411, 436, 498.

[2] *The Gauntlet*, L. R., 4 P. C. 184.

[3] *The International*, L. R., 3 A. & E. 321.

[4] *The Salvador*, L. R., 3 P. C. 218. And see *Burton v. Pinkerton*, L. R., 2 Exch. 340.

[5] *United States v. Guinet*, 2 Dallas 328.

held that it was the conversion from a peaceable to a warlike purpose which constituted the offence.

The arbitrators on the *Alabama* cases based their award against Great Britain, commonly known as the Geneva award, so far as concerned negligence in preventing the building, equipment and armament of cruisers for the Confederate States, on the facts relative to three ships: the *Alabama* herself, originally number 290, with regard both to her construction at Liverpool and her equipment and armament in the vicinity of Terceira; the *Oreto* or *Florida*, with regard to the occurrences at Liverpool, Nassau and Green Cay; and the *Shenandoah*, with regard to the occurrences at Melbourne. And for the purpose of appreciating the negligence charged they laid down these two canons:

> And whereas the due diligence referred to in the first and third of the said [*Alabama*] rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil the obligations of neutrality on their part;.....
>
> And whereas the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed.

The first of these canons must not be understood as carrying due diligence to a point at which it would be equivalent to insurance. It merely applies to the conduct of governments where the interests of others are concerned the maxim on which every one would act where his own interests were concerned, namely that the more important are the issues at stake the greater ought to be the care taken. The second canon results from the independence of states, which draws a sharp line between their internal and their international affairs. For the ascertainment of their international duties they present themselves to one another as units. Each such unit must regulate as it deems best the rights and functions of the individuals and authorities which compose it, subject to the condition that the resulting action of the international unit shall not fall below the standard which experience shows to be reasonably attainable. Where that standard is not attained, the internal conditions to which the unit has submitted itself are not quotable in its defence.

I have now examined the three famous rules in respect both of the things which they declare ought to be prevented, and of the vigilance which they declare ought to be used in their prevention, and they appear to me to be sound in both respects. I do not think that there was any miscarriage in their application to the case presented at Geneva, but, however that may be, the possibility of miscarriage is incident to all judicial proceedings, to international arbitrations not less than to others; and England, which has been so often successful in international arbitrations—notably in the Behring's Sea and, practically, the Venezuelan boundary cases, besides many of less importance—can look on their total result with equanimity. The rules are law by treaty as between the British empire and the United States, together no small part of the world. I am not aware of any objection being taken to their substance by cultivated international opinion. And I look forward to their being adopted, with whatever improvement in expression it may be possible to give them, among the definitions of neutral duty which it is greatly to be desired should be laid down by a general conference. They will always be memorable in the history of international law, not only as having been the means of settling a threatening dispute, but as a first and not unsuccessful attempt to supply some of the *axiomata media* which Bacon taught the necessity of interposing between the first principles and the detailed results of any science, and the want of which is conspicuous in the theory of neutral duties.

Illegal Prize.

A prize may be brought into a port of a neutral country after being taken on the high sea by means obtained through a breach in that country of some neutral duty comprised under one of the foregoing heads of *Illegal Enlistment, Shipbuilding or Expedition.* Along with that case, as depending on the same principles, may be grouped the case of a prize taken in the territorial waters of a neutral country, and remaining or after being carried off being brought back within them, so as to be within the power of the country of which its capture violated the neutrality. And a third case which it will be convenient to

mention at the same time is that of a prize taken in the territorial waters of a neutral country and brought into a port of the captor's country. In all these cases a state is called on to declare, either directly by its executive or through its courts, the attitude which it assumes towards a breach of the neutrality either of itself or of some other state.

One point is common to all three cases, namely that no breach of neutrality invalidates a capture as between the belligerents. Hence in a belligerent court an enemy cannot object to the condemnation of a prize on the ground that she was captured in violation of the neutrality of a third state. The sovereign of that state may intervene in the proceedings, and then restitution of the prize will be decreed to him, but failing such intervention she will be condemned[1]. If the ship is sold to a third party after such condemnation or at a prize sale ordered by the court, it has been thought in the United States that the purchaser obtains a title which cannot be impeached even in the country of which the neutrality was infringed, and even when the infraction consisted in a breach of the laws of that country. He is personally innocent, and has acquired title by a lawful proceeding[2]. Ortolan dissents from that view, saying that a neutral government of which the territory has been violated is not obliged to subordinate its right to the decision of a foreign tribunal and submit to the consequences of such

[1] *The Etrusco,* Lords, 1795, and other cases, cited in a note to *The Anna,* 5 C. Rob. 373. In *The Anna* the claim was made by the United States minister, in *The Eliza Ann,* 1 Dodson 244, by the Swedish consul, and in *The Twee Gebroeders,* 3 C. Rob. 162, by the Prussian consul under the direction of the Prussian *chargé d'affaires.* In a United States case, *The Anne,* 3 Wheaton 435, it was held that a consul cannot intervene in a case of this kind without the special authority of his government.

[2] In *La Nereyda,* 8 Wheaton 108, the United States court restored to the King of Spain a prize taken by a ship illegally fitted out in a United States port and sailing under a commission from an insurgent republic; but this was because the prize, although condemned, was still controlled by the original wrongdoer, and the claimant was unable to prove his purchase of her. Wheaton treats it as doubtful whether the ship ought not equally to be restored when through her condemnation she has passed into the hands of a *bona fide* purchaser without notice of the unlawfulness of the capture: *Elements,* § 433, Dana's numbering.

decision; and Hall agrees with him, as I also do[1]. However that may be, it is agreed by all that the captor's own position is not improved by the condemnation of the illegitimate prize, or by his purchasing her at a prize sale[2]. A proceeding instituted by him must, so far at any rate as he is concerned, be no more than a continuation of his offence.

The precise extent of the relief which ought to be given against the offending captor in the court of the injured country, when the prize is found in its waters in his possession, was considered in the case of *La Amistad de Rues*, in which a Spanish vessel captured by a Venezuelan privateer, alleged to have increased its force within the United States in breach of their neutrality laws, had been brought into New Orleans[3]. The incriminating allegation was not proved, but Story, in delivering the judgment of the Supreme Court, laid down the doctrine which he would have applied if it had been proved. The owner would have been entitled to the restitution of the prize, but not to damages for the loss occasioned by the capture. He might have demanded that the act which offended the sovereignty of the state should be undone by restoring the prize to him, and this would have been granted, solely in order to vindicate the offended sovereignty. But the demand for damages, as for a capture made without probable cause or otherwise illegal, would have involved an enquiry into the validity of the capture as between the parties, which the court could not make. The remedy which the Foreign Jurisdiction Act 1870 gives in this class of cases is limited to the restitution which Story thus deemed to be alone proper, and is as follows:

> Sect. 14. If, during the continuance of any war in which H.M. may be neutral, any ship, goods or merchandize, captured as prize of war within the territorial jurisdiction of H.M. in violation of the neutrality of this realm,
>
> or captured by any ship which may have been built, equipped, commissioned or despatched, or the force of which may have been augmented, contrary to the provisions of this act,
>
> are brought within the limits of H.M.'s dominions by the captor or any

[1] Ortolan, *Diplomatie de la mer*, t. 2, p. 302; Hall, § 227.

[2] Wheaton agrees in this: u. s.

[3] 5 Wheaton 385, Freeman Snow 406.

agent of the captor, or by any person having come into possession thereof with knowledge that the same was prize of war so captured as aforesaid,

it shall be lawful for the original owner of such prize or his agent, or for any person authorised in that behalf by the government of the foreign state to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize,

and the court shall, on due proof of the facts, order such prize to be restored.

The language of this section most easily accommodates itself to the view which I have expressed, that in the violated neutral territory the legal situation of a prize is not altered by the judgment of a belligerent prize court, since it does not except persons claiming under such a judgment from the description of persons having come into possession of the prize. Perhaps however the language might not be incapable of a different interpretation if held to be required by principle.

The United States neutrality laws enact that "the District Courts shall take cognisance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof[1]."

Of course the government of which the neutrality has been violated must do what it can to enforce the restitution of the peccant prize, being within its jurisdiction. When a French privateer captured the British ship *Grange* in Delaware Bay, the United States government required the French consul Genêt to restore it, which he did[2]. When the United States man of war *Wachusett* forcibly carried off the Confederate cruiser *Florida* from the Brazilian port of Bahia, the Brazilian government demanded reparation and obtained the release of her crew, but the *Florida* sank in Hampton Roads "by an unforeseen accident."

The legal extent of the protection against belligerent capture

[1] Sect. 7 of the act of 1818.

[2] *The Estrella*, 4 Wheaton 298, was the case of a prize taken and brought into United States waters by a privateer which had unlawfully augmented her force in them. She was recaptured in those waters by a United States cruiser, and the government libelled her, but for some reason which does not appear the proceedings were left to be fought out between the owner and the captor.

which the neutrality of territorial waters affords was discussed by Lord Stowell in the case of *The Anna*[1], the same in which he reckoned its geographical extent as being measured from the mud islands off the mouth of the Mississippi and not from the bank of the stream. "It is said that the act of capture is to be carried back to the commencement of the pursuit, and that if a contest begins before, it is lawful for a belligerent cruiser to follow, and to seize his prize within the territory of a neutral state; and the authority of Bynkershoek is cited on this point," [the *dum fervet opus* doctrine]. "True it is that that great man does intimate an opinion of his own to that effect, but with many qualifications, and as an opinion which he did not find to have been adopted by any other writers. I confess I should have been inclined to have gone along with him to this extent, that if a cruiser, which had before acted in a manner entirely unexceptionable and free from all violation of territory, had summoned a vessel to submit to examination and search, and that vessel had fled to such places as these" [the mud islands], "entirely uninhabited—and the cruiser had, without injury or annoyance to any person whatever, quietly taken possession of his prey—it would be stretching the point too hardly against the captor to say that on this account only it should be held an illegal capture." It will be observed that Lord Stowell stops far short of allowing a fight commenced outside territorial waters to be continued within them, which the danger thereby caused to neutral persons and property would render quite inadmissible.

As to the nature of the acts done by a cruiser in neutral waters which will invalidate a capture, Lord Stowell in *The Twee Gebroeders*[2] had laid down that no proximate act of war is to originate in them in any manner, and had applied that principle to the case in which a cruiser had stationed herself in neutral waters and sent her boats to make captures outside them. In another case of the same name[3] he refused to apply it to the case of a cruiser merely passing through neutral waters in order to make a capture, without stationing herself in them; but in *The Anna* he applied it in circumstances which he thus characterised.

[1] 5 C. Rob. 373.
[2] 3 C. Rob. 162.
[3] *The Twee Gebroeders* (2), 3 C. Rob. 336.

"The captors appear by their own description to have been standing off and on, obtaining information at the Balise, overhauling vessels in their course down the river, and making the river as much subservient to the purposes of war as if it had been a river of their own country. This," he said, "is an inconvenience which the states of America are called upon to resist, and which this court is bound on every principle to discourage and correct."

That a prize cannot lawfully be made in neutral waters does not depend on whether they were furnished with forts or other means of defence. There were none in the cases before Lord Stowell which have been cited, and in the case of *La Perle*[1] Portalis observed that it is the neutral territory which must be respected, without regard to its strength, and for its own sake.

But the prize which is to benefit by the fact that she was taken in neutral waters must not have begun the hostilities, although if attacked there she does not lose her right by defending herself[2]. And she must apply to the neutral authorities for protection, if she has the opportunity to do so before being attacked, and this even although those authorities may have no force at the spot capable of preventing the capture, for it is always possible that an intervention by a civil representative of the neutral state may be effectual. This ground was taken in 1851 by the President of the French republic as arbiter between the United States and Portugal, the latter power being alleged by the former to have failed in its duty as a neutral by not preventing the capture of an American privateer, the *General Armstrong*, in the harbour of Fayal, by an English squadron in 1814. The privateer not having applied at the beginning to the local authorities, Portugal was not responsible for the result of the collision[3]. It needs scarcely be said that no complaint lies against the neutral power if it does all that it can to prevent an outrage being committed in its waters.

[1] 1 Pistoye et Duverdy 100, Freeman Snow 398.

[2] *The Anne*, 3 Wheaton 435, Scott 688.

[3] 2 Moore's *International Arbitrations of the United States* 1071–1132, 2 Wharton 604. The capture of the *Modeste* in the port of Genoa in 1793 is sometimes quoted as if at that time Great Britain held imperfect views about the inviolability of neutral waters. In truth it arose from a studied disregard of the neutrality of Genoa, which it was desired to force into

Duties of Neutral States in their Public Action.

Part I.—The law independent of the work of the Hague conference of 1907.

I now come to those duties of neutral states which do not consist in regulating the action of individuals, but in themselves doing certain things or avoiding them, granting certain things to a belligerent state or withholding them from it. Some parts of such conduct, especially in what concerns the land territory of a neutral, are so obviously dictated by the principle of not taking part in any operation of war that all question about them has long ago been settled. Thus, a belligerent must not be allowed to march his troops across neutral territory, and if any of them enter it, whether of free choice or in flight from an enemy, they must be interned[1]. That they should use the territory by recovering their strength in it, or by waiting in it for a favourable opportunity of returning to the theatre of war, or to their own country where they might be available for war, would clearly be to bring the neutral soil within the range of military operations. There can be no question about it of equal permission to both belligerents: it must be permitted to neither. But to other parts of the public conduct of states similar reasoning has not been worked out to universally accepted conclusions, and these parts will especially be found in what concerns the water territory of a neutral. Thus it has not been agreed that the entrance of a belligerent force into the ports of a neutral must be followed by its internment as absolutely as its entrance on his soil, and practice has not been uniform as to the limits of the difference. This is an example of the truth that the public action to be required of neutral states has not been reduced to rule with so near an approach to completeness as the action to be required of neutral individuals. That this is so is partly due to the difficulty inherent in some of the cases which arise, but partly also to the desire of governments to hold at their disposal a field which

taking part with the allies. See Botta, *Storia d' Italia* 1789–1814, ed. 1824, v. 1, pp. 171–4 and 206.

[1] See the rules about internment, above, p. 130, and more fully in the convention there summarized.

they may use for promoting their political objects, and to the jealousy with which all depositaries of power regard any restraint on their conduct towards their equals, though they are often willing enough to legislate in restraint of their subjects. It may be doubted whether neutrals gain more by the liberty so claimed than they lose by the resentment which political motives cause, and sometimes by the undue imputation of such motives. The extension of rules appears to be desirable on every ground, and in the meantime belligerents are not bound to wait for their establishment. The area is covered by the elementary principles which underlie rules, namely that a neutral must take no part in any operation of a war, and that he must not interfere with any operation of war which is legitimate as between the belligerents. On these principles a belligerent may take his stand. Such assent of nations as makes international law is necessary for his being bound by any interpretation of them which does not commend itself to his own judgment, or by any exception to their application. He is not morally obliged to tolerate any conduct of a neutral by which his enemy may profit, if it cannot be justified by any interpretation or exception reposing on such assent. He may think it safer to endure it than by resenting it to add to the number of his antagonists, or on grounds of humanity he may think that its importance does not warrant his entering on a new war. But that is all.

Use of Neutral Waters by Belligerents.

In the detailed consideration of the duties of neutral states in their public action we will first take the subject to which in the preceding general observations we have referred as illustrative. The rules laid down by the British government for the conduct of all its departments, at the outbreak of the war between Spain and the United States in 1898 and at that of the war between Russia and Japan in 1904[1], are expressed to be applicable to the ships of war of either belligerent "in any waters subject to the territorial jurisdiction of the British crown." No distinction is made in them between littoral waters and ports or roadsteads. We have already seen that the right

[1] *London Gazettes Extraordinary*, 26 April 1898 and 11 February 1904.

of innocent passage through the littoral waters of a neutral state extends to belligerent ships of war, subject to the neutral's right to regulate it, and so long as it is used truly for passage and not for anchoring or hovering[1]. To that extent the neutral power makes no concession to the belligerent by not interfering with his right of passage, but the regulations which the neutral has to make in order to prevent the abuse of that right are substantially the same as those required for ports and roadsteads, although their enforcement may not be always practicable, so the comprehension of both in one set of rules is convenient. The questions do not include in either case the absolute exclusion of belligerent ships of war, which in littoral waters would be theoretically inadmissible and in ports and roadsteads has not practically been suggested, while in both cases it has to be considered whether and how the stay of a belligerent ship of war shall be limited—to what purposes she may put any communication which she has with the shore—whether, in those purposes or in the duration of her stay, any larger favour shall be extended to her on the ground of distress—and whether, on the other hand, she is to be treated with peculiar strictness when the distress from which she seeks refuge is pursuit by her enemy.

The British rules begin by laying down that belligerent ships of war may not use British waters "as a station or place of resort for any warlike purpose, or for the purpose of obtaining any facilities for warlike equipment," which is a statement of principles that a belligerent may fall back on when regulations for carrying them out are wanting or insufficient, whenever they are violated either by or to the profit of his enemy.

Rule of 24 hours' interval.

Then Rule 1 proceeds to say that "no ship of war of either belligerent shall be permitted to leave any [British] port, roadstead or waters from which any vessel of the other belligerent, whether the same shall be a ship of war or a merchant ship, shall have previously departed, until after the expiration of at least 24 hours from the departure of such last mentioned vessel beyond the territorial jurisdiction of H. M." This is a reasonable precaution for securing that the stay of a ship of war in neutral waters shall not be abused by making them a sallying point for captures, and

[1] Part I, *Peace*, 2nd edn., pp. 193, 196.

is referred to as a rule of the law of nations in a letter from a French captain to the governor of Cadiz in 1759[1]. In the regulations voted by the Institute of International Law in 1898, Art. 42, it is extended to the case in which the ship secondly departing is a merchantman, so as to make the 24 hours' interval apply between any two ships of mutually enemy character, and the local authority is to increase the interval if necessary, as is implied by the phrase "at least" in the British rule. And the rule of the Institute provides, in accordance as may be believed with general practice, that "the right of first departing belongs to the ship which first entered, or, if she does not wish to exercise it, to the other, who has to claim it from the local authority, which delivers the permission if the adversary, duly notified, persists in remaining[2]." We thus have what may be called "the rule of 24 hours' interval," to distinguish it from "the rule of 24 hours' stay" with which we shall meet. It has been adopted in recent declarations of neutrality or other official documents as follows. As between any two ships of mutually enemy character, in 1898 by Brazil (with the addition that the interval shall be 72 hours if the ship first departing is a sailing vessel and that secondly departing a steamer), China, Italy (which also has the rule in Art. 250 of its Mercantile Marine Code), the Netherlands and Russia, and in 1904 by France; also by the Belgian decree of 18 February 1901, Art. 19. Where the ship secondly departing is one of war, by Great Britain and Denmark in 1898 and 1904, Portugal in 1898, and Sweden and Norway and Egypt in 1904 (the latter with the addition that no vessel of one of the belligerents shall leave either of the terminal ports of the Suez Canal less than 24 hours after a ship of war of the other belligerent has left the same port); also by Spain in 1863[3]. And in 1898 Haiti and Japan promulgated the 24 hours' interval only as between the departure of mutually enemy ships of war.

A still greater care for the safety of departing vessels is shown by a clause in the regulations of the Institute of International Law, to the effect that if at the departure of a vessel

[1] Ortolan 292.

[2] 17 *Annuaire* 286.

[3] Correspondence with Great Britain, 2 Ortolan 297.

belonging to a belligerent one or more enemy ships are signalled, the departing ship must be notified, and may be readmitted to the port to await the entry or disappearance of the others[1]. And the French instructions of 1904 provide that belligerent ships in a French port must abstain from all enquiry as to the forces, position or resources of their enemies, and must not put to sea hastily (*brusquement*) in order to pursue those which may be signalled.

We may sum up by saying that the rule of 24 hours' interval is advanced far enough towards universal acceptance for a belligerent to have just cause of complaint against a neutral, if a vessel of his should be captured by a ship of war of his enemy which had been allowed to depart from a port of that power within 24 hours after her.

Rule of 24 hours' stay.

We now come to the rule of 24 hours' stay as the limit of the hospitality accorded to belligerent ships of war in neutral waters. The form in which this is received in Great Britain is found in Rule 2 of the instructions of 1898 and 1904, which requires that any ship of war of either belligerent "shall depart and put to sea within 24 hours after her entrance into any [British] port, roadstead or waters, except in case of stress of weather, or of her requiring provisions or things necessary for the subsistence of her crew or repairs; in either of which cases the authorities of the port or of the nearest port, as the case may be, shall require her to put to sea as soon as possible after the expiration of such period of 24 hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been allowed to remain within British waters for the purpose of repairs shall continue in [them] for a longer period than 24 hours after her necessary repairs shall have been completed: provided that.....the time hereby limited.....shall always in case of necessity be extended so far as may be requisite for giving effect to [the rule of 24 hours' interval], but no further or otherwise."

[1] In the regulations made by the neutral states of Italy in 1778 it is put that in such a case the departing ship shall be obliged to return to the port: 2 Ortolan 292 note.

Flight from the enemy.

The first remark on this is that no distinction is made in it between the cases of a belligerent ship of war entering neutral waters in flight from an enemy, to escape from peril of the sea, or for any reason lying within her free choice. Yet these cases may be distinguished in principle. When refuge is given even for a limited time to a ship of war flying from an enemy, in which must be included the case of escape after defeat although no pursuer may be following close, we have not to do with that aid of a merely general nature which cannot fail to be received from any use of a neutral port, but with the interruption of a specific operation of war to the advantage of the belligerent who is received but not interned. Accordingly the Institute of International Law has justly laid down that "a belligerent ship taking refuge in a neutral port from pursuit, or after being defeated by the enemy, or for want of a sufficient crew to keep the sea, must remain there till the end of the war. The same applies if she conveys there any sick or wounded, and is in a condition for fighting when she has landed them. The sick or wounded, although received and succoured, must equally be interned after being healed, unless judged to be unfit for military service[1]." The want of a sufficient crew to keep the sea is here put on a level with flight from the enemy, because to permit the recruitment of men would be a more obvious and flagrant breach of neutrality than to permit the receipt of supplies and repairs. In comparing the rule of the Institute with the British rule it must be borne in mind that the latter only limits the stay of a belligerent ship of war, not recognising or conferring on her a right even to the hospitality so limited, and that an intention cannot be presumed to surrender or fetter the power of the crown to deal with any case as the principles of neutral duty may require. The British rule is not therefore to be read as ensuring a 24 hours' stay, free from internment, to a ship of war flying from her enemy, or wanting a sufficient crew to

[1] 17 *Annuaire* 285. Although *un navire belligérant* is a term comprising merchantmen, this can scarcely have been intended, since their internment has never been proposed, and persons crossing a land frontier with their goods in order to escape requisition or pillage are not interned.

keep the sea, and we cannot believe that such would be granted to her. After the sea fight of 10 August 1904 several Russian ships fled to Chinese ports, and in the cases of the *Askold* and and *Grosovoi*, which reached Shanghai, the duty of disarming them was finally admitted and performed, though the crews were not placed under proper guard. The *Reshitelni*, which reached Chifu, was cut out by the Japanese after she had been subjected to a disarmament which her captors found not to be complete; and it seems to me impossible to assert that the Japanese exceeded their rights in this, although it was an extreme exercise of them.

Repairs and supplies in other cases, especially coal.

In every other case but those just considered a belligerent ship of war may need repair or supply, and it has never been claimed that so much repair or supply must be refused her as will enable her to keep the sea. The analogy to a force crossing his land frontier, which a neutral must intern whether or not it was flying from an enemy, is here departed from, and in that fact it is impossible not to see an effect of the desire of governments to retain in their hands the power to oblige their friends, and to avoid establishing a rule which may one day tell against themselves. Humanity is invoked, but since there would be no inhumanity in internment the only ground for the plea is the fear that, rather than be interned, a ship might try to keep the sea too long[1]. It is however agreed that a belligerent ship of war must not enlist men in a neutral port[2], make it the base of an investigation

[1] See a similar plea in favour of a belligerent's merchantmen driven into enemy waters by peril of the sea: above, p. 162. The Institute of International Law, which admits it in that case, does not admit it in favour of enemy ships of war except as addressed to generosity: 17 *Annuaire* 285. Ortolan gives examples of immunity generously allowed to enemy ships of war in distress, by French and Spanish authorities, a British example being of the opposite character: t. 2, pp. 321–5. But in dealing with neutral duties it must not be forgotten that generosity to one belligerent is exercised at the expense of the other.

[2] In the regulations of some countries, as Brazil (1898), Belgium (1901) and France (1904), the prohibition is expressly declared to include enlisting the ship's own nationals, and this is the effect of the Foreign Enlistment Act 1870 when a royal license has not been obtained to the

into the force, situation or resources of the enemy[1], or receive in it such repairs or supplies as will increase her fighting strength beyond what it was when she came in. She may be made seaworthy, and the British and usual rule extends the limit of her stay to "24 hours after her necessary repairs shall have been completed." In that time she may take in, under Rule 3 of the British instructions, only "provisions and such other things as may be requisite for the subsistence of her crew, and so much coal as may be sufficient to carry [her] to the nearest port of her own country or to some nearer named neutral[2] destination; and no coal shall again be supplied to [her] in the same or any other port, roadstead or waters subject to the territorial jurisdiction of H.M., without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within British waters." It is understood that the coal supplied under such a rule shall be used in proceeding to the destination which the commander of the ship named as being that of which the distance authorised the supply, and it may fairly be argued that in proceeding to that destination she shall make no captures, since her making any during a voyage which she had been expressly coaled for would constitute the neutral port her base of operations for the specific operation of war constituted by them; only if she is attacked during that voyage she may of course defend herself. But the

contrary; but the neutrality laws of the United States allow enlisting nationals transiently within the territory. See above, pp. 211–213. In theory the more stringent rule seems to be more in accordance with the principles enunciated above, p. 210, lest the ship should become the equivalent of a recruiting agency set up within the territory.

[1] *Ils* [the belligerent ships of war] *doivent s'abstenir de tout acte ayant pour but de faire du lieu d'asile la base d'une opération quelconque contre leurs ennemis, comme aussi de toute investigation sur les ressources, les forces et l'emplacement de leurs ennemis:* Belgian decree of 1901, Art. 15. The French instructions of 1904 are in nearly the same terms. The Institute of International Law merely requires abstinence from *tout espionnage*: 17 *Annuaire* 286. The larger form of the rule seems to be right in principle, but in any form the rule must be difficult to enforce without a strict control of the communication between the ship and the shore.

[2] The words "named neutral" were added in 1904.

legitimation by international practice, however faulty in principle, of the mere receipt of supplies without a specification of the use to which they are to be put, must imply the legitimation of any use to which they may be put[1].

The rules which have been thus far treated of, except the three months' interval between supplies of coal—which however has been adopted by the Netherlands, Denmark, Belgium, Japan and China besides Great Britain—have been adopted by numerous states as the standard of their conduct, and are substantially incorporated in the naval code recommended by the Institute of International Law[2]. When the Russian Baltic fleet was about to undertake a voyage to the sea of Japan, Great Britain took a further step in advance by the instructions of 8 August 1904[3], which appear to me to have been not only justifiable but a necessary corollary from admitted principles. After reciting that the principle of the previous British regulations "does not extend to enable belligerent ships of war to utilise neutral ports directly for the purpose of hostile operations," it was directed that the rule which "refers to the extent of coal which may be supplied to belligerent ships of war in British ports during the [then] war shall not be understood as having any application to the case of a belligerent fleet proceeding either to the seat of war, or to any position or positions on the line of route with the object of intercepting neutral ships on suspicion of carrying contraband of war; and that such fleets shall not be permitted to make use in any way of any port, roadstead or waters subject to the jurisdiction of H.M. for the purpose of coaling, either directly from the

[1] The supplying and coaling the Confederate cruisers in British ports which entered into the grounds of the award in the *Alabama* case must not be and were not judged by the better practice which has since so widely arisen. The Confederate ports being closed by blockade, a proposed voyage to them would not have been a justification of coaling the cruisers even had the practice then existed. But in the award the coaling and other supplies were connected with previous failures in neutral duty, which the entry of the cruisers into British ports gave the opportunity of correcting by detaining the ships, or with repetitions of supply, sufficient, without specification of its purpose, to make the ports a base of operations.

[2] 17 *Annuaire* 285.

[3] Parliamentary Paper, Russia No. 1 (1905), p. 15, and Malta Government Gazette of 12 August 1904.

shore or from colliers accompanying such fleet, whether vessels of such fleet present themselves to such port or roadstead or within the said waters at the same time or successively; and that the same practice shall be pursued with reference to single belligerent ships of war proceeding for the purpose of belligerent operations as above defined; provided that this is not to be applied to the case of vessels putting in on account of actual distress at sea." France stands at the other extreme of the scale of advance in the definition of neutral duties, not only not following England in treating the voyage to a scene of action as a special case to which all assistance in coal ought to be denied, but not even limiting the stay in her ports of belligerent ships of war not accompanied by prizes to 24 hours or any other time; while she limits the supplies and repairs which such ships may receive in her ports only to the subsistence of their crews and the safety of their navigation, without any reference to the quarter towards which such navigation may be directed[1]. We must therefore admit that the rule of 24 hours' stay, and the limits which as above mentioned have been set by many states to their supply of coal, are not yet a part of international law[2]; but the amount of recognition which they have received would lend very great weight to any complaint which a belligerent might make on principle of conduct by a neutral power not in conformity with them.

Prizes in neutral ports.

A prize sailing under the war flag of her captors stands in principle, for the purpose of her reception into a neutral port, on the same footing as if she had originally belonged to her captors. But there is always the danger of a conflict on board her between her own crew and the prize crew, and, if she is accompanied by a ship of war, of a conflict between the two ships; and this furnishes a sufficient reason for a special objection being taken by neutrals to the reception of prizes in their ports.

[1] Instructions of February 1904: 11 *Revue Générale de D. I. P., Documents*, p. 2. See above, p. 203. It is not the practice of Germany to issue detailed general instructions for the conduct of her forces and authorities with regard to a war in which she is neutral.

[2] This, which was written before the Hague Conference of 1907, is now subject to the Convention XIII of that conference. See below, pp. 248–250.

Indeed, even if the captors are so superior that no such danger practically exists, their retention of the prize is a continuous exercise of force over the captured crew[1], and no exercise of force between belligerents can in theory be permitted in neutral waters. It was not however from these considerations but because of the injury done to commerce by the illegal practices of privateers and pirates, that the regulations of 1650 and ordinance of 1681 prohibited the stay of prizes in French ports for more than 24 hours, except for stress of weather or if they had been captured from enemies of France, the property of French subjects to be taken out of them before their departure and restored[2]. It is possible that this regulation of 24 hours' stay for prizes suggested the similar regulations in different countries for belligerent ships of war generally, but by many powers prizes are now treated as exceptions and ships of war are prohibited from taking them at all into their ports when neutral except in case of distress. Notably this is the case in Great Britain[3], Italy[4], Belgium[5], the Netherlands, Denmark and Japan[6]. France, Spain and Brazil adhere to the older system of applying the rule of 24 hours' stay to ships with prizes and not to other ships of war, but they prohibit altogether the disposal of prizes or of articles coming out of them, a prohibition which is implicitly contained in the refusal of entry to the prizes though often expressed in addition to it. Of course all this paragraph refers to prizes which have not been judicially condemned by the proper court or sold by its direction. Once that has been done the vessel is the property of the new owner and is no longer a prize.

[1] Vattel observes that *garder et retenir des prisonniers de guerre est une continuation d'hostilités*: l. 3, § 132. But the use which he makes of this principle is to prohibit a privateer from landing his prisoners and keeping them captive on shore. He does not perceive that it equally condemns what he describes without disapproval as being the practice, namely that *un armateur conduit sa prise dans le premier port neutre et l'y vend librement.* The explanation may be that he appears from the context to have been thinking of the case only as it affects property.

[2] 2 Ortolan 303 note. [3] Art. 4 of the instructions of 1898 and 1904.

[4] Art. 246 of the Marine Code.

[5] Art. 10 of the decree of 18 February 1891.

[6] The last three by their regulations of 1898 or 1904.

Even when a prize lies in a neutral port, the belligerent power whose cruisers have captured her cannot set up a court there to try the capture. The exercise of jurisdiction being a right attached to sovereignty, to attempt it anywhere without the permission of the territorial sovereign would be a usurpation, and for that sovereign to grant the permission would be an unneutral loan of his sovereignty to the belligerent. The same reasoning does not apply to an ally, but the general sentiment is opposed to his allowing a court to be set up in his territory. It is, says Ortolan, "the general rule among all maritime powers that captors are bound to take or send their prizes to the ports of the state to which they belong, and as far as possible to the ports where they were equipped"—the last clause refers to privateers—"and that, under severe penalties, nothing shall be removed from the prize or alienated before a definitive judgment of a special court, sitting in the territory of that state, has pronounced the validity of the capture[1]." The rule however does not appear to require the presence of the prize in the ports of the state where the court is held. Phillimore, quoted with acquiescence by Hall, says that "an attentive review of all the cases decided in the courts of England and the North American United States during the last war, 1793–1815, leads to the conclusion that the condemnation of a capture by a regular prize court, sitting in the country of the belligerent, of a prize lying at the time of the sentence in a neutral port, is irregular but clearly valid[2]." This, if established in practice, seems to be unsound in principle. To be a proper subject of adjudication a prize must have been brought *intra praesidia*, which is not the case while she lies in a neutral port, in which any forcible control of her ought not to be allowed by the territorial sovereign.

No asylum where previous breach of neutrality.

It remains to be considered whether any asylum at all ought to be given in neutral waters to belligerent ships of war or their prizes when the former have been fitted out or the latter taken in breach of the neutrality of the very state under the protection

[1] *Diplomatie de la mer*, t. 2, p. 313.

[2] Phillimore, v. 3, § 379, quoted by Hall, § 226.

of which they seek to shelter. We have seen that by British law and United States' practice the prize which is in such a case is so far from enjoying an asylum that she ought to be seized and restored[1]. It has been thought that from a ship of war the stain of violated neutrality is wiped away by her commission. Accordingly the Confederate cruisers which had been illegally despatched from English ports were afterwards treated by the British authorities as if there was nothing against them. That view was not accepted by the arbitrators at Geneva, who found that "the *Alabama* was on several occasions freely admitted into the ports of the colonies of Great Britain, instead of being proceeded against as it ought to have been in any and every port within British jurisdiction in which it might have been found"; a finding of similar purport being made as to the *Florida*, with the addition, "nor can the fact of the entry of the *Florida* into the Confederate port of Mobile, and of its stay there during four months, extinguish the responsibility previously to that time incurred by Great Britain." This appears to be the correct reasoning. A state which has not adequately enforced the observance of its neutrality is bound to take every opportunity of stopping the mischievous consequences of its slip, nor can its doing so be rightfully complained of by a foreign sovereign who has granted a commission only rendered possible by the violation of neutrality. At least the obligation resulting from the slip cannot be destroyed by the circumstance that it may involve the state to which the slip is imputable in a difficulty with a third party. To intern the offending ship without insisting on her forfeiture would seem to conciliate as far as possible the duty of stopping her career with respect to a foreign flag[2].

[1] Above, pp. 229, 230.

[2] It is desirable to take every opportunity of effacing the prejudice against international arbitration which the Geneva award has created in this country. We will therefore observe that even if the wrath of a state of which the neutrality has been infringed ought to be diverted by a commission granted by a friendly power into seeking redress by diplomatic channels, still diplomatic channels were not open in the cases of the *Alabama* and *Florida*, the Confederate States not having been recognised as a power. They had only been recognised as having

Part II.—The Convention respecting the Rights and Duties of Neutral Powers in case of Naval War, being No. XIII of the conventions which issued from the Hague Conference of 1907.

The convention named at the head of this section declares in its preamble that it has been concluded "with the view of lessening the differences of opinion which in the case of naval war still exist as to the relations between neutral and belligerent powers, and of preventing the difficulties to which such differences might give occasion." It has been observed above that the differences so referred to have had their main source in the desire of governments to hold at their disposal a field which they may use for obliging their friends, and to avoid establishing rules which may one day tell against themselves[1]. The divergences of view came out strongly at the Hague Conference of 1907, with the result that the Convention No. XIII has not been signed by the United States, or been accepted by some other great powers without serious reservations, and that the subject formed no part of the programme for the Conference of London, and is therefore wholly omitted from the *Declaration of London.* In these circumstances it has been thought advisable to leave the preceding part of the present section as it was written before the last Hague Conference, and here to note the bearing on it of what has since occurred. This will best be done in the course of summarising in their order the important parts of the Convention No. XIII.

Art. 1. Belligerents are bound to respect the sovereign rights of neutral powers.

Art. 2. Capture and the exercise of the right of search are among the acts which a belligerent ship of war may not commit in neutral waters.

Art. 3. When a prize captured in neutral waters is still within the jurisdiction of the neutral power, that power shall employ the means at its disposal to release it with its officers and crew, and to intern the prize crew. If the prize is not within the neutral power's jurisdiction, the captor government, on the demand of the neutral power, must release the prize with its officers and crew.

belligerent rights; therefore, if the ships were not liable to be stopped, Great Britain was defenceless against the wrong done her by the continuance of their depredations—*quod est absurdum.*

[1] See above, pp. 233–4.

In the latter case Great Britain had proposed that the neutral power should be bound to make the demand, notwithstanding that in the absence of an international prize court the demand can only be made diplomatically; but this was not agreed to.

Art. 4. No prize court can be set up by a belligerent in neutral territory or waters.

This is a rule to the establishment of which the conduct of the United States in 1793 greatly contributed.

Art. 5. A belligerent must not make neutral waters a base of naval operations.

Wireless telegraphy and other means of communication are expressly mentioned as not to be established there.

Art. 6. A neutral power must not directly or indirectly furnish to a belligerent ships of war, ammunition, or war material of any kind.

Art. 7. But a neutral power is not bound to prevent the export or the transit, on behalf of a belligerent, of arms, ammunition, or any thing useful to an army or a fleet.

Art. 8 is almost identical in its wording with the first *Alabama* Rule. The four Articles 5—8, as a whole, are inspired by the spirit of the *Alabama* Rules, and draw the same distinction between the acts which they prohibit and the trade in contraband of war.

Art. 9. A neutral power must apply the orders emanating from it impartially to the belligerents, but may exclude from its waters a belligerent ship which has disobeyed its orders or violated neutrality.

Art. 10 declares that the neutrality of a state is not affected by the mere passage of ships of war and their prizes through its territorial waters.

Turkey has accepted this article only with the reservation of "its undoubted rights over the Dardanelles and the Bosphorus."

Art. 11, which has not been accepted by Germany, provides that a neutral power may allow belligerent ships of war to employ its licensed pilots. Professor Oppenheim justly points out that this must be understood as limited to pilotage in territorial waters, and that Great Britain in 1870 prohibited her pilots from conducting either French or German men-of-war outside the territorial belt: *International Law, War and Neutrality*, § 353.

We now come to two Articles, 12 and 13, which adopt the *rule of 24 hours' stay*[1] only "in default of special dispositions to the contrary in the legislation of the neutral power in question." These Articles have been accepted by Great Britain and Japan, in default of better, after a hard struggle at the conference. They have not been accepted by Germany, which proposed to distinguish by the proximity or otherwise of the neutral ports to the theatre of war. France and Russia led the opposition to limiting the discretion of neutral states, putting forward reasons which shall be taken from the introductory paragraphs of the report of M. Renault, from whom I cannot express dissent without paying a warm tribute to his learning and ability. It was there said that the reception of a belligerent ship in a neutral port presents a different question from that of tolerating belligerent land forces in neutral territory, because ships of war are usually allowed to enter neutral ports in time of peace and are free to choose when they will leave; and it was asked whether a neutral state can suddenly break off that custom, which was described as a duty of hospitality. This argument is parallel to that which would claim immunity for the traffic in contraband of war because the traffic in the same things is free in time of peace. It was further said, with reference to the fact that the rules laid down in different countries vary, as also do those laid down in the same country at different times, that "the essential thing is that all should know what to expect, and that there shall be no surprise." This treats as practically unessential the abstention from rendering aid to a belligerent, which the reporter consistently mentions elsewhere merely as a duty to be reconciled with the duty of hospitality. Again it was said that "the starting point of a regulation must be the sovereignty of the neutral state, which cannot be affected by the sole fact of a war to which it intends to remain a stranger." The only possible meaning of sovereignty in such a connection is freedom of choice not seriously restricted by rules, a sense which, if it were admitted, would make all international law an infringement of sovereignty. These principles are familiar to us in international action, and are by no means unknown in the penumbra of diplomatic expression. Indeed they are the relics of the time

[1] See above, p. 237.

before the theory of neutrality had begun to be elaborated. Not the less is their present appearance in a scientific form, backed beyond all question by sincere scientific conviction, an important fact to be noted.

Art. 14. A belligerent ship of war may prolong her stay in a neutral port beyond the lawful time for no other reason but damage or stress of weather. Ships of war devoted exclusively to religious, scientific or philanthropic missions are exempt from all limits of stay.

Art. 15. In default of the laws of a neutral state fixing in advance the maximum number of ships of war of a belligerent which may be at the same time in one of its ports, the number shall be three.

We now come to the "rule of 24 hours' interval[1]."

Art. 16. When ships of war of the belligerent parties are at the same time in a neutral port or road, at least 24 hours must elapse between the departure of a ship of one belligerent and that of a ship of the other.

The order of departure is determined by that of arrival, unless the ship first arrived is entitled to a prolongation of her legal stay.

A belligerent ship of war cannot leave a neutral port or road less than 24 hours after the departure of a merchantman carrying the flag of her enemy.

Articles 17 and 18, returning to the field of the *Alabama* Rules, limit the repairs of a belligerent ship of war in neutral ports and roads to the measure necessary to render her seaworthy, and forbid such ships renewing or increasing in neutral waters their supplies of war material, their armament or their crews.

Art. 19. Belligerent ships of war cannot revictual in neutral ports or roads except to complete their stores normal in time of peace.

Such ships also cannot receive more fuel than is necessary for gaining the nearest port of their own country. They can however (*d'ailleurs*) receive the fuel necessary to fill their bunkers properly so called, when they are in neutral countries which have adopted that measure of the fuel to be furnished.

If by the law of the neutral state ships cannot receive coal till 24 hours after their arrival[2], the lawful length of their stay is prolonged by 24 hours.

Great Britain and Japan have refused to ratify Art. 19, and they and the United States formed in committee a minority of three against its second paragraph. The limitation in the first

[1] See above, p. 235.

[2] As by the Italian Code of merchant shipping, Art. 249, paragraph 2.

sentence of that paragraph to the fuel necessary for gaining the nearest port of the ship's country was the British proposal, and the reporter, M. Renault, stated: "The meaning of that proposal was clearly defined by Sir Ernest Satow in answer to a question of M. Hagerup. The rule is one simply for calculation, and does not create for the neutral any obligation to watch over the destination of the ship which asks for the fuel. We allow ourselves to add that it does not imply any obligation for the ship to betake herself to any particular destination. In this way disputes which sometimes arise would be avoided." It will be observed that Sir Ernest Satow disclaimed responsibility to third parties for the proceedings of the assisted ship, and in this he was certainly correct, since to follow and watch her would be a duty too onerous to be imagined. M. Renault's opinion that the assisted ship will be under no obligation to the country in which she has coaled must be compared with what we have said above, p. 240.

Art. 20 adopts the rule of three months' interval between coalings in ports of the same neutral state—above, pp. 240, 241. Sir Ernest Satow proposed in committee to add to it a rule based on but carrying still further the British instructions of 8 August 1904—above, p. 241—to the effect that no munitions, victuals or fuel are to be allowed to a belligerent, "for going to meet the enemy or for engaging in operations of war." For this only Great Britain, Japan and Spain voted.

Art. 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the cause which justified its entry has ceased. If it does not, the neutral power must order it to leave at once, and, should it fail to obey, must supply the means at its disposal to release it with its officers and crew and to intern the prize crew.

Art. 22. A neutral power must similarly release a prize brought into one of its ports in circumstances other than those provided for in Art. 21.

Art. 23. A neutral power may admit prizes to its ports or roads, whether they are escorted or not, when they are brought there in order to be left under sequestration pending the decision of the prize court. It can cause the prize to be conducted to another of its ports.

If the prize is escorted by a ship of war, the officers and men put on board her by the captor are allowed to pass to the escorting ship.

If the prize sails alone, the prize crew is left at liberty.

Great Britain and Japan were the only powers which voted in committee against this great assistance sometimes given by neutrals to belligerents, for the sanction of which the reason alleged was to prevent the destruction of prizes or render it less frequent. The same powers have reserved the Article from their signature of the treaty.

Art. 24 relates to the measures to be taken by a neutral power when a belligerent ship of war persists unlawfully in staying in one of its ports, and Art. 25 obliges a neutral power to prevent, as far as the means at its disposal allow, any violation in its waters of the provisions of the convention.

Use of Neutral Soil by Belligerents.

Any question about illegitimate advantage to be obtained by a belligerent on neutral soil can scarcely arise except where the immediate source of the advantage is the action of individuals or that of the territorial sovereign: the action of the belligerent state is excluded by the fact of the soil being foreign to it, with no such exception as in the case of neutral harbours arises by the customary admission of the belligerent flag under certain conditions. Consequently most of the possible cases have already been dealt with in going through the various heads under which the British Foreign Enlistment Act and the United States Neutrality Laws repress the unneutral action of individuals. The principal matters which remain to be noticed are the loan of money, which has not fallen under legislation in the English-speaking countries, and the use which the territorial sovereign may fairly permit to be made of his postal and telegraphic services.

Loans to belligerent states.

I. Since money is truly described as the sinews of war, and it is no part of the business of a state to deal in money, its loan by a neutral state to a belligerent would necessarily have a special character, not only as aiding the latter in fact but also as disclosing an intent to aid him in his war. It would therefore be an unneutral act. If by the law of the neutral state the consent of the executive is required to loans by individuals to foreign powers, or if the executive is in the

habit of practically controlling such operations by the exercise of its influence, a loan by individuals to a belligerent which is allowed to slip through the meshes will have an international character not distinguishable from a loan by the state. But in countries where, as in England, the loan market is free in time of peace, the question arises whether the state is bound to interfere with it in time of war by a prohibition to lend to belligerents. In such a country loans to foreign states are not political but commercial acts, falling within the daily habits of persons engaged in business, not implying any intent by those persons as to the use to be made of the money by the governments assisted, and such that to prevent them just when the greatest profit is likely to be obtained from them would be felt to be an onerous interposition. They do not constitute a participation in any specific operation of war, nor is the branch of business to which they belong reserved for public action by the general understanding of the civilised world. Tried therefore by the tests which have been suggested as imposed by the theory of neutrality[1], loans by neutral individuals to belligerent states must be pronounced legitimate, and such they are in fact held to be. During the Franco-German war of 1870, large parts of the loans contracted by both belligerents were raised without objection in England.

The case has by some writers been confounded with that of loans to unrecognised insurgents against friendly powers, which in England and the United States are illegal. But those operations do not fall under the principles relating to neutrality, since, even when separation is the object of the insurrection, it is only after the new state has been recognised as independent by the state in which the loan is made that there are in the eyes of the latter two friendly powers between which there can be neutrality. Even the recognition that the insurgents have established so solid a military position as to be entitled to the rights of belligerents will not affect the question. Such recognition will ensure respect for their acts of war, and will impose duties on the recognising state and its subjects, but it does not raise the insurgents to the position of friends, and assistance given to them remains

[1] Above, p. 205.

assistance given against the only friends whom either international law or the law of the land sees in the case. Nor can it be said that loans to insurgents are a part of any regular financial business. They are very special operations, the motive of which is seldom free from the ingredient of political intent[1].

Use of postal and telegraph services.

II. There is no doubt that a state is bound in principle not knowingly to allow the use of its services for the reception and transmission of letters or telegrams, the latter whether wireless or not, in furtherance of belligerent interests; and where any such service is not a state monopoly, its exercise in the territory by a private undertaking ought to be subject to a similar restraint[2]. Such use of the service would be a direct aid to the belligerent, an implication in the operations which were combined by means of it, and would make the territory a base of operations to that extent. There is however great difficulty in making any practical application of the principle. The contents of letters cannot be known without an intolerable violation of the secrecy of the post office, and the true meaning of telegrams may be concealed by cipher, or by the employment of common words and names arranged to convey to the recipient a sense which others cannot penetrate. It does not seem possible for a neutral state to do more than to refuse for itself, and prohibit for the private undertakings in its territory, the reception and transmission of messages in cipher, or in common language which from its want of apparent sense may be inferred to be the equivalent of cipher, when those messages appear from their

[1] See *De Wütz v. Hendricks*, 9 Moore C. P. 586, and *Kennett v. Chambers*, 14 Howard 38, Scott 723. In the last mentioned case the District Court of the United States held a contract illegal which was made with the object of assisting in the equipment of the army of the insurgent Mexican province of Texas, at a time when it had not been acknowledged by the United States as the independent state of that name, but when the establishment of its independence was hardly doubtful.

[2] *Il est entendu que la liberté de l'état neutre de transmettre des dépêches n'implique pas la faculté d'en user, ou d'en permettre l'usage, manifestement pour prêter assistance à l'un des belligérants*: Art. 4 of the resolutions of the Institute of International Law on submarine cables, 19 *Annuaire* 332.

address to be intended for the benefit of a belligerent operation. In the instructions issued in 1898 by Brazil, Art. 5 ran that "it is prohibited to citizens, or aliens residing in Brazil, to announce by telegraph the departure or near arrival of any ship, merchant or war, of the belligerents, or to give them any orders, instructions or warnings with the purpose of prejudicing the enemy." This seems to go too far, since suppression of the information usually given of the movement of shipping, however intended to deny assistance to one belligerent, might operate as an assistance to the other.

Of course a neutral state must not allow a belligerent to have in its territory an establishment of his own for postal or telegraphic service, as Russia was too long allowed by China to have a station near Chifu for maintaining wireless communication between Port Arthur, besieged, and the outer world. But a neutral state cannot be bound to prohibit or prevent the passage of wireless messages across its territory. Just as there is a right of innocent passage through the littoral sea, there must be a right of innocent passage through the vertically littoral air, which before long it may become necessary to define, but which certainly must not be so limited as to impose too heavy a burden on the sovereign of the ground.

CHAPTER IX.

DECLARATION OF LONDON AND BLOCKADE.

The Declaration of London.

We have now arrived at some chapters which oblige us to take account of the *Declaration of London. Convention No. XII* of the Hague Conference of 1907 was *for the Establishment of an International Prize Court*, and has been signed without reservation by all the most important powers, but has not been ratified by Great Britain, mainly because Art. 7, which lays down the law to be applied by the court, is not thought to be definite enough. In that article treaties binding the parties to the proceedings naturally hold the first place, and in their absence "the court," it is said, "shall apply the rules of international law. If no generally recognised rule exists, the court shall give judgment in accordance with the general principles of justice and equity." Accordingly the ten most important maritime states of the world—in the alphabetical order of their French names, Germany, the United States, Austria-Hungary, Spain, France, Great Britain, Italy, Japan, the Netherlands and Russia—met at London by the invitation of Great Britain, in a conference of delegates "for the purpose of determining in common what are the generally recognised rules of international law within the meaning of Art. 7." The result of their deliberations was the Declaration of London in 71 articles, signed on 26 Feb. 1909 on behalf of all the powers represented, but which has not yet acquired an obligatory force between them by exchange of ratifications. The British government having submitted the question of its ratifying the Convention and the Declaration to the judgment of parliament, the House

of Commons voted in the affirmative, but the House of Lords refused its approbation, mainly on the ground of certain points which, as the powers could not agree on them, the Declaration left still for decision by the international prize court, in case it should be established, in accordance with its sense of justice and equity. Nevertheless the Declaration of London, embodying in a large body of rules the agreement, even though in its present state not an obligatory one, of the representatives of the whole first class naval powers of the world, carries a weight on the points determined in it which belongs to no private international code, and cannot fail to exercise a great influence both on international practice and on international opinion. This must be so even in those points which were compromises, for such is the force of habit over the mind that the practice of a *modus vivendi* rapidly converts the common approbation originally given to it as such a *modus* into a common approbation of its substance. Consequently, in what still lies before us, the Declaration of London will have to be frequently introduced as furnishing the closing and most important, even though not yet the decisive scene, in an historical review.

Blockade.

From immemorial antiquity the operations of a siege have included preventing communication between the besieged place and the outside, by ingress, egress, or transport inwards or outwards. Every attempt by neutrals to cross the line of investment is a palpable interference with a specific operation of war, incompatible as such with their duties as neutrals, and has always been sternly repressed by the besiegers[1]. This is equally true when the besieged place is on the coast and the line of investment partly on the sea, and in that case it

[1] Charles le Téméraire, besieging Nancy in 1475–6, exclaimed, when executing a gentleman who had tried to throw himself into the place, *dès qu'un prince a mis son siége devant une place, quiconque passe ses lignes est digne de mort.* Comines remarks on this: *il ne s'en use point en nos guerres, qui sont assez plus cruelles que la guerre d'Italie et d'Espagne, là où l'on use de cette coutume*: l. 5, c. 6 (t. II, p. 48) quoted by Michelet, *Histoire de France jusqu'au* 16me *siècle*, edn. 1852, t. 6, p. 406.

has been made the basis of extensions which have resulted in the international doctrine of blockade. To understand those extensions it must be borne in mind that the word "blockade" originally meant "siege by investment," and must not, when first met with, be taken in the technical sense which has grown up along with the technical doctrine[1]. The history commences with 1584, in which year the Dutch government issued a *placaat* declaring all the ports of Flanders then remaining in the power of Spain to be blockaded. Those ports were not many, they must at that time have all been more or less strongly fortified, and the naval power of the Dutch was already considerable. It is consequently quite intelligible that a real attack on them all may have been intended, or at least such an intention professed; and we must not assume that the term "blockade" was used so early in any other sense than that of "siege." We should rather understand that the intention was to use the right of siege on an unprecedented scale. For nearly half a century the Dutch did not advance further in the particular direction thus entered on, probably because they boldly tried to prevent all commerce whatever with their enemies[2], but a significant development appeared in the great work of Grotius, published

[1] "The word *blocus* or *blockade* is neither to be found in Du Cange nor in the vocabulary of barbarous Latinity appended to Facciolati. *Bloc*, in the language of the Walloon country, signified a high mound; whence persons who had died under sentence of excommunication, and whom it was not lawful to bury beneath the soil, were said to be *imblocati* because the earth was heaped over their bodies as they lay on the surface: Du Cange, v. *Imblocatus*. We are brought still nearer to the root by *bloche*, which in the dialect of Champagne signified a clod of earth: Du Cange, v. *Blesta*. And *blocage* even now denotes in France the rubblework often used to fill up the interior of walls, or a rough wall itself when entirely composed of such work. Our own *block* is obviously allied, though we do not use it of stones or nodules so small as to serve for rubblework. Thus a stone, nodule, clod or mass, smaller or larger—a funereal barrow, a dyke or mound, themselves large blocks or masses and piled up of smaller clods and rubble—even, if occasion serves, a rough and ready wall, built with the unwrought materials obtainable on the spot—lastly, a circumvallation: such is the series of ideas presented to us by the words of this family." Westlake, on *Commercial Blockades*, in the *Transactions of the Juridical Society, 1858–1863*, vol. 2, p. 701.

[2] See the *placaat* of 1599, mentioned above, p. 199.

in 1625. After mentioning objects of use only in war and those which are of use only in peace, the former of which are declared to be always capturable, the latter never, he says about objects which are of use in both war and peace (*ancipitis usus*) that "if the introduction of the supplies impeded me in the pursuit of my right, and this was open to the knowledge of the person who introduced them, as if I was keeping a town besieged or ports closed, and a surrender or peace was already looked for, he will be bound to repay me for the damage occasioned by his fault[1]." Here the condition that a surrender or peace seems near, and the circumstance that a right of capturing objects of no use in war is not given at all, were limitations of which belligerent governments disposed to close the ports of their enemies to neutrals took no account. But the mention of the closure of ports as a distinct case from siege, operating in the opposite direction as an encouragement, was availed of with all the more freedom since Grotius had placed his opinion on the ground of the law of nature, finding, as he says, nothing settled about the matter by agreement. The need of that encouragement must have been felt by the Dutch because since 1584 Ostend had passed into the hands of the Spaniards, and England from a co-belligerent had become a neutral power, so that siege of all the Flemish enemy ports at once was not to be thought of. Within five years from the appearance of the *De jure belli ac pacis* the government obtained opinions from the admiralty of Amsterdam and, as Bynkershoek believed, from private lawyers, to the effect that "the rule which obtains in the case of towns, which are properly said to be besieged, and which has with good reason been applied to camps, which are as it were besieged, extends also to the enemy's ports, which when invested by ships are deemed to be besieged[2]." On the strength of these opinions the States General in 1630 issued a *placaat* in which they announced their

[1] *De jure belli ac pacis*, l. 3, c. 1, § 5. And see the passage quoted above, p. 201, from l. 3, c. 17, § 3.

[2] Bynkershoek, *Quæstiones juris publici*, i, 11. That great jurist passed lightly over the equivalence of investment to siege, which by his time had been settled, but wished that Grotius "had not added the condition that a surrender or peace is already looked for."

intention to confiscate neutral ships caught at any distance sailing for the enemy's ports in Flanders, as also those which, having broken the blockade, should be caught at any time before the completion of their voyage. This they justified by the declaration that "their High Mightinesses keep the said ports continually blockaded by their vessels of war at an excessive charge to the state, in order to hinder all transport to and commerce with the enemy, and because those ports and places are reputed to be besieged, which has from all time been an ancient usage after the example of all kings, princes, powers and other republics, which have exercised the same right on similar occasions[1]." For the real absence of settled usage we may safely accept the statement of Grotius in preference to the phrases of official style asserting its existence. What is important in the *placaat* is that investment by sea takes the place of any necessity for true siege. In other words blockade as a technical institution, with its interception of all commerce and not merely of contraband goods, is officially adopted by Holland, and thenceforward stands out distinctly from the confused ideas of previous ages[2]. That the investment should be real, as in the actual instance the *placaat* asserted it to be, the authority from which that document emanated could not take from neutrals the right to judge for themselves. If it was alleged by them not to be real, that would be a dispute between the governments concerned.

The new institution however did not immediately find acceptance outside Holland. The Dutch government did not help to smooth the difficulty over by showing much practical moderation, for in 1652 it proclaimed a blockade of all the coasts of the British Isles, of which it would be absurd to imagine any real investment. But it was capable of adapting its course to the pursuit of diplomatic advantage, and it did not renew the *placaat* of 1630 on the occasion of its decreeing a blockade of Flanders in 1645, and in its treaty of 1646 with France, while obtaining (as it believed) the concession of the rule "free ships free goods," it did not insist on the equivalence

[1] Robinson's *Collectanea Maritima*, p. 158.

[2] See above, p. 201; also p. 200, as to the influence of such unilateral acts in developing the law.

of investment to siege, but acquiesced in the confiscation of ship and cargo being denounced against those who shall have succoured or thrown men, grain or provisions into a place attacked by his majesty's armies[1]. And this provision was substantially repeated in the Anglo-French treaty of 1655[2]. The Franco-Spanish treaty of the Pyrenees in 1659 prohibited commerce of all kinds with towns and places "besieged, blockaded or invested," but added an express prohibition of French commerce with Portugal, as being a revolted province of Spain, the whole Portuguese coast being apparently regarded as too extensive for the Spanish blockade to be relied on for legally sealing it[3]. But the Anglo-Swedish treaty of 1661, while also prohibiting the entry of all kinds of articles into besieged places, restricted the right of capturing them to cases of contraband: if goods not contraband should be carried by either party to ports or places besieged by the other, they might either be sold to the besiegers or carried away freely to ports not besieged[4]. In the Dutch-Algerine treaty of 1662[5] and the Dutch-Swedish one of 1667[6] the prohibition of commerce with besieged places extends to contraband and articles which may tend to the convenience or assistance of the enemy, which, if not intended as a euphemism for all articles, would probably be interpreted as such by the Dutch admiralty. And this is the last which we hear of any limitation, even veiled, of the kind of commerce obnoxious to blockade. But both the treaties in question insist on the limitation of blockade to siege—the Algerine one prohibiting the commerce with "towns actually besieged in regular form

[1] Dumont, t. 6, pt. 1, p. 342. See above, p. 143, as to the efforts of the Dutch in favour of the rule "free ships free goods." "The language of this treaty [of 1646] would seem to support the construction put upon it by De Witt, that it provided for the perfect freedom of the Dutch carrying trade; but De Witt found to his surprise that the French interpreted the treaty merely to provide for the temporary suspension of the ordinance of king Henry III (A.D. 1584), according to which enemy's goods forming part of the cargo of a neutral vessel infected the remainder of the cargo and the vessel itself, and led to the condemnation of both as good prize." Twiss, *War*, § 81. But the Dutch obtained from France the concession of "free ships free goods" in 1662.

[2] Dumont, t. 6, pt. 2, p. 121.

[3] Ib., p. 264. [4] Ib., p. 384. [5] Ib., p. 445.

[6] Dumont, t. 7, pt. 1, p. 37.

(*obsidione justa realiter cinctis*) either by sea or land, and by no means in any other case"—and the Swedish one prohibiting it with "fortresses, towns or places having military garrisons, so long as it shall happen that they are under siege or attack by an armed force with the intention of reducing them into the power of such force, and, in respect of places situate on the coast, by land as well as by sea." Such careful phraseology begets the suspicion that the governments and admiralties of naval powers were beginning to assume the equivalence of investment to siege with a freedom which the simple word "siege" in a treaty could not be trusted to prevent. The new institution had indeed nearly reached its maturity, and it was finally recognised by the Anglo-Dutch treaty of 1674[1], the Franco-Dutch one of 1678[2] and the Dutch-Swedish one of 1679[3], in all which commerce in articles not contraband is declared to be free "except with towns or places besieged, shut in or invested (*obsidione cinctis, circumseptis vel investitis*)," to which the first of the three adds "*Gallice, blocquées ou investies.*"

That before the end of the seventeenth century blockade had acquired the definite meaning of a lawful exclusion of all commerce from an invested place, subject to the question of what might be a real investment, may be concluded further from the fact that, in contrast with the extravagant use of the term in 1652[4], it was not used in the Anglo-Dutch convention of 1689, notified by the parties to all the European powers. That document did not profess to exercise a belligerent right against neutrals but, in effect, to forbid neutrality. It dwelt on the necessity of destroying the commerce of France in order to prevent a great effusion of blood, and recited that many sovereigns had prohibited trade with France and that others would soon prohibit it, wherefore the two allies prohibited commerce with the whole coast of France and with all French possessions in every part of the world, and announced their intention of seizing on the high seas, at any distance from France, any ship which might be found sailing for her ports[5]. This was an extraordinary stroke of policy, and, as the *placaat*

[1] Ib., p. 282. [2] Ib., p. 357. [3] Ib., p. 437.
[4] See above, p. 259. [5] Dumont, t. 7, pt. 2, p. 238.

of 1599[1] and the similar attempt in 1793, outside law even in the ideas of those who resorted to it; and was marked as such by the separate article by which the two allies promised to aid each other in suppressing the resistance which they expected that their action would arouse. There are reasons for thinking that the interdiction so fulminated was not attempted to be enforced for more than a few months, and that the armed neutrality of 1693 was caused by other infractions of maritime law.

The question of the equivalence of investment by sea to siege as conferring a right to cut off neutral commerce, of which we have traced the history, was nearly equivalent to that which has been raised in more modern times of the legitimacy of commercial blockade. Of a port neither fortified nor garrisoned but purely commercial there cannot be real siege: such a port can be occupied from the sea whenever desired. On the other hand a naval force which desires to cut off neutral commerce from a port not purely commercial can have little difficulty in giving a colour of attack to a maritime investment of it. It was in the form of an objection to commercial blockades that the question of the seventeenth century was revived in the nineteenth. In the preamble to the Berlin decree of 1806 Napoleon, with a lofty disregard of more than a century of intervening history, complained that "Great Britain extends the right of blockade to unfortified towns and commercial ports, to harbours and the mouths of rivers, though according to right reason and the usage of all civilised nations it is only applicable to strong places." And in 1859 President Buchanan of the United States added the abolition of commercial blockades, as a condition for adhering to the Declaration of Paris, to the immunity of private enemy property at sea which had at first been made the only condition[2]. Secretary Cass wrote that "the investment of a place by sea and land with a view to its reduction, preventing it from receiving supplies of men and material necessary for its defence, is a legitimate mode of prosecuting hostilities, which cannot be objected to so long as war is required as an arbiter of national disputes. But the blockade of a coast or of commercial positions along it, without any regard to ulterior military operations and

[1] Above, p. 199. [2] See above, pp. 145, 177.

with the real design of carrying on a war against trade, and from its very nature against the trade of peaceable and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times[1]." The same view was supported in England by Cobden[2], but the tendency of the times has been against it, and the belligerent right of commercial blockade is well established as a part of the compromise between the exigencies of belligerents and the just claims of neutrals which has been effected by tacit international agreement. The denial of it cannot be based on any theory of neutral duty which will not set the belligerent free from any limitation of the articles which he may please to consider as contraband of war. It may be put on the alleged superiority of his exigencies, called rights, our condemnation of which has been expressed above[3]. Or it may be put, as Hautefeuille and others have done, on a ground which applies only to one interpretation of the compromise, in connection with which I shall mention it[4].

The compromise between belligerents and neutrals is, however, subject to the question whether there is anything peculiar in the character of the investment which neutrals have accepted as equivalent to siege, and on this we meet with a long and great controversy which still exists if the Declaration of London shall not be found to have settled it. One point has always been certain, namely that, whether the blockade be a commercial or a military one, there must be a real danger to the blockade-runner in crossing the line of the investment, independent of any danger which he may run of being caught earlier with the intention of crossing it, or later after having crossed it. A line which it is not in itself highly dangerous to try to pass cannot be that of an investment, nor can it affect with technical guilt either the intention to pass it formed at a distance, or

[1] Circular to the powers, among others to Mr Dallas, minister to Great Britain, under date of 29 June 1859: 3 Wharton 373, 7 Moore 450, 781.

[2] The abolition of commercial blockades was advocated by me in *Papers read before the Juridical Society, 1858–1863*, vol. 2, pp. 681–721, and in a pamphlet entitled *Commercial Blockades considered with reference to Law and Policy*, 1862.

[3] P. 194.

[4] See below, p. 265.

the fact of its having been passed. This is expressed as follows by the Declaration of Paris:

4. Blockades, in order to be binding, must be real[1], that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

If "really to prevent access" were taken literally, the successful crossing the line by one blockade-runner would prove the blockade to be void, which has never been contended. The meaning therefore must be, "to make the attempt at access highly dangerous." But, this being so, a question remains as to the method by which the danger may be created. The continental powers, including Holland herself after her relative decline in naval power, have usually maintained that a blockade is only valid in law if the danger of ingress or egress arises from the cannon either of ships, stationary or sufficiently near one another, or of works on land. This is laid down, with more or less variety of expression, in the treaty of 1742 between France and Denmark, in that of 1753 between Holland and the Two Sicilies, in the declarations and treaties of armed neutrality in 1780, in the various adhesions of other continental states to that armed neutrality or its rules, and in the declarations and treaties of armed neutrality in 1800[2]. When Russia,

[1] *Effectifs* in the original, which means "real," not "producing an effect," as effective, which is the official translation, usually means in English. So also whenever an English writer mentions an effective blockade, he must be understood to mean a real one, that is a real investment, and not to be adding any further condition to its reality.

[2] In several of these pieces the place to be blockaded is described as attacked, but, considering the practice of the eighteenth century, it must be admitted that this arose only from habit, or at least was done without an intention to require a real attack. An exception to that interpretation is however furnished by the treaty of 1787 between France and Russia, in which the rule of the armed neutrality of 1780 is reproduced with a variation requiring an attack by a number of ships proportioned to the strength of the place, and Napoleon or his advisers may have had that treaty in their mind when drafting the Berlin decree. But that will not excuse the transparently false assertion about "the usage of all civilised nations." See above, p. 262. Again, many of the treaties, ending with that between Russia and Denmark in 1818, require the line of investment to be formed by a certain number of ships, usually two. That of 1753, mentioned in the text, requires six ships, which may

by a change of policy consequent on the battle of Copenhagen and the death of the emperor Paul, abandoned the armed neutrality of 1800, her treaty of 1801 with England required for a blockade the presence only of ships stationary *or*, instead of *and*, sufficiently near to create an evident danger of entering. Yet in 1823 she assured the United States that she no longer held herself bound by that engagement[1].

On the other hand Great Britain ever since the institution of blockade as a technical procedure, and the United States ever since their independence, have acted on the view that the danger necessary to maintain the reality of a blockade may be at least in part created by cruisers, agreeing in that with the practice of Holland in the age when she founded the institution. They never asserted that the danger arising from liability to capture at any distance for intended or accomplished breach of a blockade, which at the hands of a power having the command of the sea may be very real, could without more vindicate its reality. There must be a distinct blockading squadron, which however need not be stationary. The Lords of Appeals, of whom Sir William Grant was the chief, expressed themselves in language which is thus reported in substance. "It was the duty of the blockaders to maintain such a force as would be of itself sufficient to enforce the blockade. This could only be effected by keeping a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the [blockaded] island[2]."

Those who accept the continental doctrine may support it, as is done by Hautefeuille and others, on the right acquired by a line of ships whose fires cross. That right cannot indeed be described as conquest, which is not now admitted except as arising by the terms of peace or by the extinction of the enemy state, nor even in those cases could conquest be asserted of any but littoral waters, outside which the blockading squadron may happen to lie. But whether within littoral waters or without

lie a little outside the range of the shore batteries, but which must expose blockade-runners to danger from their cannon.

[1] Lawrence's *Wheaton*, edition of 1863, editor's note 235.

[2] In *The Nancy*, 1 Acton 57.

them stationary ships with crossing fires may be held to have established an occupation, giving a right of control analogous to that exercised by a belligerent in the district occupied by him on land. Even so however the argument only reinforces the right of blockading by means of a stationary squadron. It does not put out of court the claim to a larger right of blockading based on international practice embodying and sanctioning a compromise between the opposing claims. And when we remember that the Anglo-American doctrine has been acted on for more than two centuries, and during all that time, except for the short periods covered by the two armed neutralities, has been acquiesced in *de facto* even by those powers which have disputed it as a matter of law—also that the Declaration of Paris was so worded as not to exclude it—it seems to me that, in spite of the invidious name of "paper blockade" which has been given to it[1], it cannot at this time of day be refused an authority equal to that of the other doctrine. It is a case in which neither a belligerent taking the line which suits him, nor a neutral resenting that line, can at present be stigmatised as a law-breaker, and for the solution of which some express international agreement is desirable.

The question just discussed seems in the actual state of naval war to go to the root of blockade itself, for the danger to a stationary squadron from torpedoes and submarine boats would be so great at night that such a squadron could not keep its station except by day. On the other hand blockade by cruisers, if admitted, seems still to have a great part to play in the future. Captain Mahan has written: "Is it necessary, to constitute a real danger to blockade-runners, that the blockading fleet should be in sight? Half a dozen fast steamers, cruising twenty miles off shore between the New Jersey and Long Island coasts, would be a very real danger to ships seeking to go in or out by the principal entrance to New York; and similar positions might effectually blockade Boston, the Delaware and the Chesapeake....It seems probable in these

[1] The name "paper blockade" properly describes any blockade which it is attempted to impose by notification without reality, but since Great Britain never attempted this without reality in her sense, the opprobrious name practically signifies want of reality in the continental sense.

days of submarine" [and we may now add wireless] "telegraphs, that the blockading forces in shore and off shore, and from one port to another, might be in telegraphic communication with one another along the whole coast of the United States, readily giving mutual support; and if by some fortunate military combination one detachment were attacked in force, it could warn the others and retreat upon them. Granting that such a blockade off one port were broken on one day by fairly driving away the ships maintaining it, the notification of its being re-established would be cabled all over the world the next. To avoid such blockades there must be a military force afloat that will at all times so endanger a blockading fleet that it can by no means keep its place[1]." In these circumstances it seems likely that, so far as blockade may be employed in the future, the argument of necessity will induce even those powers whose theory has been that of blockade only by stationary ships to give it in practice the form of blockade by cruisers. The Danish government blockaded the ports of Northern Germany in 1864 by cruisers, though in its regulation of 15 February 1864, published expressly for that war, it had maintained its view of 1780 and 1800[2].

[1] *The Influence of the Sea Power upon History, 1660–1783*; edition of 1890, pp. 85, 86.

[2] Gessner, *Le Droit des Neutres sur Mer*, 2e éd., p. 184. He quotes thus the Danish regulation referred to in the text: "*Un port ennemi est bloqué quand il est cerné par un ou plusieurs vaisseaux de guerre, de manière à ce qu'aucun bâtiment marchand ne puisse entrer dans ce port ou en sortir sans un danger évident d'être saisi.*" *Cerné* implies investment by a closed line, and the same necessity results from the requirement that the danger must be evident. It is common on the continent to treat the Declaration of Paris as having consecrated the doctrine of the armed neutralities on blockade, but that declaration does not reproduce the condition of *evident* or *manifest* danger. It says that the blockade must be real (*effectif*), and if on the one hand that means that there must be a real investment, on the other hand it tests the reality of the investment by its being maintained by a force sufficient *really* to prevent access. Such a form allowed Great Britain to sign without abandoning blockade by cruisers when strict enough to be real, though the force so applied may not be evident to a vessel which has arrived near the entrance of the port. It is needless to say that the great blockade of the Confederate coast by the United States was enforced by cruisers. Its legality as such was questioned by

A discussion of the controversy between the continental and Anglo-American systems was commenced at the Hague Conference of 1907, but was broken off in consequence of the statement made by the British delegation on 16th August that, the question not having been raised in the Russian programme, their government had not been under the necessity of instructing them on it, and that a solution of it would probably require some concessions on each side, for the thorough examination of which they were not ready. It fell therefore to be examined by the Conference of London, which dealt with it in the two following articles of the Declaration of London.

17. Neutral vessels may not be captured for breach of blockade except within the area of operations (*rayon d'action*) of the ships of war charged with ensuring the reality (*effectivité*) of the blockade.

20. A vessel which has broken blockade outwards, or has attempted to break blockade inwards, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned or if the blockade is raised, her capture can no longer be made.

The effect of these articles is that there must be a distinct blockading squadron, which must have a definite area of operations assigned to it, but may cruise within that area; and that a capture for breach of the blockade may only be made by a ship of that squadron, and either within that area or in the course of a pursuit commenced within it, provided in the latter case that the absence of the pursuing ships has not reduced the force remaining within the area so far as to raise the blockade by operation of law. There is nothing in the Declaration to prevent assigning line behind line of ships to the blockade, if the blockading power is able to devote so large a naval force to the purpose, and thereby pushing off the limits within which a capture may be made or a pursuit commenced to the extreme distance at which such a power can make the blockade real. In my judgment a reasonable satisfaction would thus be given, on the one hand to the necessity of admitting blockade by cruisers, on the other hand to the wisdom of freeing commerce from being harassed at too great a distance from the blockaded coast.

Although a blockade may be established on his own authority

no neutrals, a fact which must have its weight as a nearly contemporary exposition of the Declaration.

by the belligerent commander on the spot, he more usually establishes it on the instructions of his government, which notifies expressly to neutral powers, as well as announces in some public manner at home, the blockades which it directs, or which it adopts on information being given of them by its commanders. The notification or announcement is not sufficient without the reality of the blockade, but it is important on the question of the knowledge which is necessary for culpability. The neutral power which has received notification of a blockade is bound and presumed to publish the information throughout its dominions, and the announcement of a blockade by a belligerent power may be the subject of notoriety. A vessel sailing from a port belonging to a state to which a blockade has been notified by a belligerent government, or from a port at which it was notorious that a belligerent government had directed or adopted a blockade, or to whose owner or master the knowledge that a blockade had been so directed or adopted can be brought home by any kind of proof, may under the Anglo-American system be captured at any point of her voyage to the blockaded port, and will be condemned, provided that the blockade really existed at the moment of her capture. The offence being deemed in that system to consist in intending to pass a line of investment, its commission dates from the commencement of the attempt to pass it. The only exception is when the vessel has sailed from a port so distant that her owner or master may have had ground for thinking that the blockade might be raised before her arrival, through a change in the plans of the belligerent government. Then, when met by a cruiser, she will be justified in having prosecuted her voyage with a view to enquiry, but such enquiry ought to be made, and she ought to intend making it, at a neighbouring port and not at the blockaded one. If the blockade of which the owner or master had knowledge was established by a commander on the spot, and had not to the knowledge of the former been adopted by the government of the latter, its continuance is regarded as less certain, and enquiry at the spot will be allowed. If on such enquiry it is found that the blockade continues, the vessel will be dismissed with a warning, and will not be allowed to plead enquiry as her purpose, if she appears a second time at or on her way to the

blockaded spot. Under the continental system, which does not admit blockade by cruisers, there can be no real blockade if there is not a ship at the spot of which enquiry can be made. Hence an enquiry is always allowed on the first visit to the spot, but after the warning then given the next visit will be punished by capture and confiscation, the illegitimate intention being deemed to be manifest. The Declaration of London borrows from the Anglo-American doctrine its rule (Art. 15) that "knowledge of the blockade is presumed, failing proof to the contrary, when the vessel has left a neutral port after it has been notified in sufficient time to the power to which such port belongs," but modifies the consequences of that rule by providing (Art. 16) that notification on the spot, when necessary, can only be made by an officer of one of the ships of the blockading squadron, as well as by its prohibition of capture outside the limits of the blockade.

The notification or announcement of a blockade, whether by a government or by a commander on the spot, must not embrace a larger extent of coast than is really blockaded, since otherwise, by its deterrent effect on the sailings of neutrals, it would gain some of the advantage of blockade where the reality which is the only justification of that advantage was wanting. Such an excess in the notification would vitiate the blockade even of those parts of the coast on which it was really established. In the American civil war President Lincoln's proclamation notified the intention to blockade the whole Confederate coast, and the actual blockade was announced by the different commanders as different parts of that coast were considered by them to be really blockaded. Each neutral vessel attempting ingress was therefore entitled to receive and received a warning, as in the case of a blockade by a commander which no government notification had introduced; only this ceased when the blockade had become notorious at the ports from which the blockade-runners sailed, as though the fact and its notoriety related to the proclamation. Some of the announcements by the commanders were more extensive than they had forces to support, and the mixed commission under the treaty of Washington awarded damages to the *Monmouth* for being warned off the whole coast.

A blockade is broken and the penalties for its breach are

incurred as well by egress from the blockaded port as by entering it, and the shipping in that port are in general presumed to have notice of the blockade as soon as it is really laid, although the Declaration of London, Art. 16, requires the enemy commander to notify the blockade to the port on which he lays it. But in all recent wars a time has been fixed by the blockading government within which neutral vessels may leave the port with their cargoes, and even after that time they may leave in ballast or with cargoes loaded on board before the commencement of the blockade[1]. The time during which a vessel which has broken a blockade by egress, whether she was in the port at the commencement of the blockade or had entered that port by a successful breach of it, may be captured with condemnation as the result, is subject to a difference between the Anglo-American and the continental schools analogous to that which we have seen to exist as to the commencement of the liability for a breach by ingress. Those who hold that a blockade can only be maintained by a stationary squadron restrict to that squadron the right of vindicating a breach of it. A ship of that squadron may pursue the blockade-runner who has succeeded in passing its line to any distance compatible with the maintenance of the blockade by the remainder of the force, but when he has once entered a neutral port the affair is closed and he is free. The opposite school allows any ship of war, whether she has or not been a member of the blockading squadron, to capture the offender at any distance from the blockaded port until his destined voyage is ended, supposing always that the blockade is really in existence at the time of the capture. In the opinion of that school the blockade-runner has not got rid of his culpability, deposited it as the phrase is, by entering a neutral port not that of his destination in order to escape pursuit or under stress of weather. On his leaving it the chase can be renewed or taken up by some other ship[2].

The blockade once established must be continuously maintained. If its reality is interrupted, even for a short time,

[1] See in Twiss, *War*, § 113, peculiar cases in which the prohibition of egress is held not to apply to neutral vessels.

[2] Ortolan (4^{me} édition, t. 2, p. 354) seems to approve the Anglo-American doctrine, but he is an exception to the general continental view.

subject to the question to be mentioned about interruption by weather, the legal effect will not be merely to free from penalties the vessels which have entered or left the port during that time, but to render necessary the re-establishment of the blockade in the manner necessary for the first establishment of one. This was questioned by the United States in their great blockade of the Confederate coast, in a case of which Mr Seward wrote to Lord Lyons, 27 May 1861: "We are informed that the *Niagara*," blockading Charleston, "was replaced by the steamer *Harriet Lane*, but that owing to some accident the latter vessel failed to reach the station as ordered until a day or two after the *Niagara* had left.... This government holds that the blockade took effect at Charleston on the 11th day of this month, and that it will continually be in effect until notice of its relinquishment shall be given by proclamation of the President of the United States." Professor Bernard, on this, expresses the contrary view as follows. "Mr Seward was mistaken.... The temporary absence of the blockading force, if it be such an absence as to remove the risk of capture, not only impairs the blockade but discontinues it, unless the absence be involuntary and caused by stress of weather. If the blockading ships be blown off by a gale, the reasonable presumption is that they will return as soon as weather permits, and the neutral trader is therefore bound by that presumption. But no such presumption arises when they are sent away on other service, nor even where without orders they chase to a distance from the port. Nor is the neutral bound to enquire whether the intermission is due to a miscalculation on the part of the government, or to mistake or disobedience on the part of its officers, or to any accidental cause[1]." The doubt here is whether the exception of interruption by weather can be admitted. It is affirmed by Lord Stowell[2], and admitted by Ortolan[3] and by Pillet, the latter of whom adds that Stowell's decision on the point "has been

[1] *Neutrality of Great Britain during the American Civil War*, p. 239. Mr Seward's despatch is on p. 238.

[2] *The Hoffnung*, 6 C. Rob. 112.

[3] T. 2, p. 344. He adds what we suppose is generally held by partisans of the exception, that ingress during the actual interruption by weather will not be culpable.

received without difficulty[1]," but it is not admitted by Gessner[2]. The only difference to a neutral between interruption of a blockade by weather and by any other cause is that, in the former case, he has before his senses a reason for rejecting the supposition that the interruption arises from an intention to discontinue: but what is the importance of the belligerent's intention, if the rule is that the blockade must be real? And Gessner urges that the consequences of chance and the fortune of war must be borne by the party on whom the blow falls. The exception appears to me to be maintainable on the ground that blockade would be almost an absurdity if weather were not understood to be allowed for, but I deprecate maintaining it on the ground of intention, which would favour serious tampering with the necessary reality of blockades.

A blockade may be limited, so long as, first, the belligerent power enforcing it does not reserve for its own subjects any means of access or of commerce which it forbids to neutrals; secondly, the relaxations of the general rules of blockade are not inconsistent with the existence of any blockade at all; thirdly, the relaxations are notified to neutral states, so that their subjects may be fully apprised of what they may or may not do[3]. The object of a blockade being the interruption of commerce, one can scarcely quote as an example of a limited blockade the fact that during the American civil war neutral ships of war had free access to the blockaded coast. A good example of one was furnished in the Crimean war by the Anglo-French blockade of the Danube, declared "in order to stop all transport of provisions to the Russian armies," which was held not to affect the export of cereals from the Danube, such being "in furtherance of the objects of the allies and to the prejudice of the Russians[4]." And another may be found in the British blockade of all the coast from Brest to the Elbe in 1806, that of the part from the Seine to Ostend being more rigorous than that of the other parts of the line[5]. Licenses to particular persons, in cases of blockade

[1] *Lois Actuelles de la Guerre*, p. 137. [2] P. 209.

[3] See the judgment of the Privy Council in *The Franciska*, 10 Moore P. C. 37, Scott 804.

[4] *The Gerasimo*, 11 Moore P. C. 88, Scott 811.

[5] Manning's *Law of Nations* 332; Twiss, *War*, § 118.

and others, were granted by Great Britain during the wars of the French revolution and empire, in favour as well of belligerent as of neutral individuals, and caused great offence. Such licenses in case of blockade appear to be indefensible.

Since the material part of the offence of blockade-running consists in the ingress or egress, or attempted ingress or egress, of a ship, and the master, by whom the course of the ship is directed, is the agent of her owner, the master's knowledge of the blockade binds the owner, and the ship is confiscable independently of the latter's personal knowledge. Where the ship and cargo belong to the same persons, the knowledge of the master, as their agent, affects them to the extent of all their property concerned in the transaction, and the cargo also is confiscable. Where the ship and cargo belong to different persons, it has been "established that when the blockade was known or might have been known to the owners of the cargo at the time when the shipment was made, and they might therefore by possibility be privy to an intention of violating the blockade, such privity shall be assumed as an irresistible inference of law, and it shall not be competent to them to rebut it by evidence....The necessity of acting upon these rules is rested by Lord Stowell on the notoriety of the fact that in almost all cases of breach of blockade the attempt is made for the benefit and with the privity of the owners of the cargo; that if they were at liberty to allege their innocence of the act of the master, it would always be easy to manufacture evidence for the purpose which the captors would have no means of disproving[1]." The owners of the cargo, if the penalty was really incurred without their privity, must seek their remedy against the master or owners of the ship. It may however happen that the blockade was known to the master but not to the owners of the cargo, whose property will then escape condemnation[2].

Since blockade-running is not a hostile proceeding, and the belligerent's rights with regard to it are limited to those which the accepted compromise gives him over the ship and cargo, the crew of a captured blockade-runner must not be treated as

[1] Lord Kingsdown, in *The Panaghia Rhomba*, 12 Moore P. C. 168, Scott 800.

[2] Some cases of this kind are mentioned by Twiss, *War*, § 116.

enemies and prisoners. They are bound not to resist the vessel's being taken to a port of the captors for adjudication, but if they rise and rescue her their state will not be obliged to restore her or visit the crew with any punishment. If however she falls again into the power of the captor's state before her offence has been deposited by the completion of her voyage, she will be condemned with her cargo, which suffers for the deeds of the master to which it was entrusted, whatever may be the merits of her case in other respects[1].

Limitation of Blockade by the rights of Neutral Territory.

Where the mouth of a river divides a belligerent from a neutral state, the enemy of the former does not lose his right of blockading the shore belonging to it, but he cannot interfere with the trade of the other shore. In 1870 the French blockaded the Prussian but not the Hanoverian shore of the Ems, treating the latter as neutral from political motives, though Hanover had been conquered by Prussia four years before. This during the American civil war was conceded as to the mouth of the Rio Grande, dividing Mexico from Texas, one of the Confederate States; "but the Supreme Court [of the United States] laid down the rule that it was a duty incumbent on vessels with the neutral destination to keep south of the dividing line between the Mexican and Texan [water] territory, and in the case of vessels captured for being north of that line [without being driven across it by weather] refused, while restoring them, to allow their costs and expenses." We agree with Hall that "it is to be hoped that a rule so little consistent with the right of neutrals to uninterrupted commerce with each other will not be drawn into a precedent[2]."

Where there are neutral states on the upper waters of a river, it is clear on principle that a belligerent's right of blockading either the whole or one side of its mouth cannot

[1] See Bernard, *Neutrality &c.*, pp. 323-9, for various incidents connected with the matter of this paragraph.

[2] Hall, from whom the quotations are taken, § 266. See Bernard, *Neutrality &c.*, note on p. 318.

entitle him to interfere with the commerce of those states, though the rule has not perhaps been always respected.

A blockade cannot affect the commerce which the blockaded port carries on through a neutral port with which it has inland communication[1].

We reserve the question of continuous voyages in connection with blockade till we can treat it as a whole in connection with contraband.

[1] *The Ocean,* 3 C. Rob. 297, Scott 819.

CHAPTER X.

CONTRABAND OF WAR.

Contraband of war are those articles which belligerents prohibit neutrals from carrying to their enemies, not in connection with a blockade but because they are regarded as being objectionable in themselves, either generally or in the particular circumstances of a war. It may here be mentioned once for all that although the terms used with reference to contraband in public documents, by authors or in these pages, often seem to contemplate only things carried in ships, which of course present the commonest case, ships themselves, when suitable for any warlike use and on their voyage with a view to sale in a hostile port or for delivery to the enemy, fall under the same principles and are contraband. No one contests this, and in the British view, to be developed later, they are absolute contraband.

On some of the prohibited articles there is a settled agreement between belligerents and neutrals, with regard to others there is much variation in the pretensions of belligerents and the submission of neutrals to those pretensions. But however indeterminate the class of contraband may be, its existence is recognised by all authorities on international law, a fact which amounts to a double understanding. One face of that understanding is that the commerce of neutrals with a belligerent is not necessarily to be free whenever it cannot be connected with a specific operation of war, even by so loose a deduction as that which has expanded siege into blockade. The other is that it is not to be entirely suppressed. Between those two poles what international law there is on the subject began to arise in the sixteenth century, on the foundation of the more moderate of

the warnings given by belligerents to neutrals. The name of contraband was derived from those warnings, its literal sense being that which is contrary to the ban or edict, and it having already, before its use in war, been applied to trade which contravened national or municipal regulations[1].

In the earliest of the more moderate unilateral acts to which we have referred we can trace two opposite tendencies which have never ceased to divide the world on the subject, the one pointing to a more restricted prohibition of neutral commerce, the other to a prohibition at once larger and not definitely limited. Thus the French ordinance of 1543 prohibited only munitions of war, while England prohibited victuals in 1587 and 1591, and in 1592 gave a very wide definition of canvas as a prohibited article[2]. In 1589 England condemned corn in Hanseatic ships and in 1597 in Polish, as being aid or supplies, alleging that the Hanse towns, Poland and Sweden had done the same[3]. Spain condemned tobacco in English ships as victuals, on the ground that by the use of tobacco the consumption of victuals might be prolonged, and Elizabeth granted letters of reprisal only on the ground that the inference as to tobacco was erroneous[4]. Thus at this time France stood very much alone for the restricted form of prohibition, and she took the same line in negotiation. In the arrangement of May 1599 between Elizabeth and Henri Quatre the former had to exempt French subjects from search, on Henri's undertaking that they should not carry enemy's goods, or carry to the Spaniards "arms,

[1] See above, p. 122, as to the warnings referred to. Twiss quotes from Ducange an Italian charter of 1445, in which a trade in salt contravening municipal regulations is called *contrabannum*, but its use in the treaty of Southampton between England and the United Provinces, 1625, seems to be the first appearance of the word in relation to the laws of war which he could trace: *War*, § 121.

[2] As early as 1370, as well as in the treaty with Scotland of which the application was questioned in 1543, she had obtained the prohibition of victuals by treaty. See above, pp. 198, 199.

[3] Letter of Secretary Cecil to Sir Henry Neville, 2 July 1599, in Winwood's *Memorials*, v. 1, p. 57; Camden, *Hist. Eliz.*, anno 1597; Zouch, *Fetial Law*, p. 128: all quoted by Twiss, *War*, § 124.

[4] Zouch, *Fetial Law*, part 2, § 8, and *De Judicio inter Gentes*, § 8, part 2, p. 132; quoted by Twiss, *War*, §§ 123, 127. See also what is related by De Thou, above, p. 200, note 2.

munitions or other instruments or materials of war, either by land or sea," the French representatives being expressly unwilling to include provisions in the list[1]. And in the abortive negotiations of 1602 the draft, probably emanating from the French side, which was discussed by the English and French commissioners, proposed by its Art. 6 only to prohibit carrying any kind of arms to the enemy, though accompanying this with a proviso that the liberty of commerce should not be abused by the subjects of either power to the prejudice of the other[2]. A similar contrast may be remarked in that Henri Quatre was less tolerant than Elizabeth of the principle of the *placaat* of 1599 by which the Dutch prohibited the carriage of all goods whatever to the Spaniards. He directed his subjects to submit to it for the limited term of six months, while her government held it to be "an effect of great necessity which had no law[3]," and the other powers of Europe passed it over in silence.

This first stage in the history of special commerce prohibited to neutrals ends with the treaty of Southampton, an offensive and defensive alliance concluded 17 September 1625 between Charles I and the United Provinces. That treaty declared that "all contraband goods, as are victuals and munitions of war, ships, arms, sails, cordage, gold, silver, copper, iron, lead and the like, whencesoever they are carried to Spain or to any other country subject to the King of Spain or his adherents, shall be good prize together with the ships and the men that they shall carry." And on 4 March 1626 an English proclamation, rather to be regarded as explaining than as extending the clause of the treaty, gives what is probably the earliest detailed enumeration of prohibited articles, especially detailed with regard to what in a previous proclamation of 31 December 1625 had been summarily described as materials for ships or munitions of war. In these provisions we have the less restrictive of the two tendencies previously traceable embodied in what may be described as the first sketch of a law on the subject, with the name of contraband and a specification doubtless derived

[1] Winwood's *Memorials*, v. 1, pp. 19, 22, 23.

[2] Ib., p. 392.

[3] Sir Henry Neville's letter of 15 May 1599 to Secretary Cecil Winwood's *Memorials*, v. 1, p. 23; quoted by Twiss, *War*, § 126.

from the practice then most widely prevailing, especially that which had grown up in the English admiralty. The proclamations base themselves on "the rules of policy," "the law of nations," the quality of Charles as "a monarch and prince sovereign," "former declarations and acts of state made in this behalf in the time of Queen Elizabeth of famous memory," and the practice of "other states and princes upon the like occasions, avowed and maintained by public writings and apologies[1]." At the same time the right of states and princes to add to the specification was not understood to be relinquished. On the contrary, in 1674, during a war between France and Spain, a Spanish privateer having captured pitch and tar belonging to English subjects on board a Swedish ship bound to Rouen, Sir Leoline Jenkins, in an opinion which he gave to Charles II, began by pointing out that such goods were not made contraband by the Anglo-Spanish treaty of 1667. He went on to say that unless they were affected by being in the Swedish ship, they "cannot be judged by any other law but by the general law of nations; and then I am humbly of opinion that nothing ought to be judged contraband by that law in this case but what is directly and immediately subservient to the uses of war, except in the case of besieged places"—meaning blockade—"or of a general notification made by Spain to all the world that they will condemn all the pitch and tar they meet with[2]."

France however did not abandon the position which at that time was almost special to her, and she obtained the assent of Spain to it by the treaty of the Pyrenees in 1659[3]. Art. 12 of that treaty prohibited as contraband a list of things which may be described as arms, adding *et autres assortiments servants à l'usage de la guerre*, but no materials except saltpetre; and Art. 13 declared that victuals should be free except when carried to Portugal, an exception dictated by the policy of the moment,

[1] The clause of the treaty and the proclamations may conveniently be seen in Twiss, *War*, §§ 121, 122, 123. The belief in a law of nations on interference with neutral commerce can be traced as early as the *Hispanicae Advocationes* of Albericus Gentilis.

[2] *Life and Correspondence of Sir Leoline Jenkins*, v. 2, p. 751.

[3] Dumont, t. 6, part 2, p. 266.

or to blockaded places. Two years later the more widely received understanding received a fuller development in the treaty of Whitehall between England and Sweden[1], 1661, so that these two treaties may be opposed to one another as being at their date the standards on their respective sides. The Anglo-Swedish Art. 11 prohibited a list of things which may be described as arms, adding *et quæcunque alia bellica instrumenta*, and money, *commeatus*—by which victuals for military or naval use appear to be intended—saltpetre, horses, horse furniture, ships of war and guardships, all under pain of confiscation. A stipulation followed in the same article that "neither of the confederates shall suffer any of his subjects to give aid, sell or lend ships, or be in any way useful to the enemies or rebels of the other to his prejudice or detriment." Under that clause the English prize court held that pitch, tar and other materials for building and equipping ships, the produce of Sweden, found in Swedish vessels bound for the enemy, could be brought in, but for preemption and not for confiscation. This practice was confirmed by the Anglo-Swedish convention of 1803, which fixed the price for preemption at the invoice price in Sweden or the market price in England at the choice of the owner, with ten per cent. additional and an indemnity for detention and necessary costs[2].

The treaty of Whitehall shows marks of the influence of Grotius. Writing when no clear doctrine either of contraband or of blockade had emerged from the mediæval welter, for his great work was published in the year of the treaty of Southampton, Grotius mentions neither of those terms—which might be partly due to his studied classical style[3]—and mixes the two subjects in what he says about belligerent interference with neutral commerce. Things which are of use only in war he holds to rank the neutral as being on the side of the belligerent to whom he supplies them, and they can always be confiscated by the enemy. Of supplying things which serve only for pleasure no complaint can be made. For a judgment on the

[1] Ib., p. 385; Hertslet, v. 2, p. 329.

[2] Martens, *Recueil*, t. 8, p. 92. See Lord Stowell in *The Zacheman*, 5 C. Rob. 152.

[3] See above, p. 190.

supply of things useful both in war and in peace, such as money, provisions (*commeatus*), ships and what belongs to ships—*res usus ancipitis*—the grounds which he selects are the belligerent's necessity, the neutral's knowledge of his necessity, and the justice of his cause. The first standing alone, will authorise the belligerent who meets with the goods to intercept them subject to an obligation to indemnify the neutral. The second makes the neutral culpable, with a liability, if harm to the belligerent who meets with the goods has not yet followed, to their being detained and security for the future exacted from him, but if the surrender of a place or the conclusion of peace has been hindered, then to their confiscation by way of redress[1]. And when the justice of the belligerent with whom he meets on his way is very evident, the neutral will be liable not only civilly but criminally, to punishment which in practice must depend on that belligerent's discretion. This doctrine of Grotius met with an imperfect and indirect success. Although the expression *res usus ancipitis* has come to be loosely used, the distinction which Grotius employed it to express has never been accurately applied as the test for a practical distinction; nor has recognition of the self-alleged justice of each belligerent's cause been accepted as a neutral duty. But the recognition of the belligerent's necessity by a philosophical writer, and the example set by him of not treating all cases of contraband alike, must have contributed to the birth of a system in which a belligerent was allowed to consult his necessity on condition of preemption.

The view of contraband which found one of its earliest expressions in the treaty of Whitehall may, from the state most eminent among its authors and upholders, be called the British view. Its most remarkable features are, first, the assertion of a class of conditional or occasional contraband, or contraband of circumstance, never including any thing solely of peaceful use, but in which things of use both in peace and in war, on their way to a hostile destination, may be placed as occasion requires, being otherwise entirely free; secondly, a milder treatment, by way of preemption, in certain cases roughly corresponding to that class. Goods *usus ancipitis* may be contraband of the

[1] We have seen this under the head of blockade, above, p. 258.

conditional class either by virtue of an express declaration by the belligerent government, based on the circumstances of the war, or by the judgment of its prize court, when that court sees reason for believing or presuming that they are intended to be used for purposes of war. The Admiralty *Manual* of 1888, embodying the British practice, declares that such a "presumption arises when the hostile destination of the vessel [carrying the goods] is either the enemy's fleet at sea, or a hostile port used exclusively or mainly for naval or military equipment[1]." An example is furnished by the well known case of the Dutch cheeses, fit for naval use, which Lord Stowell condemned when taken on their way to Brest, where an expedition was known to be in preparation[2]. Goods *usus ancipitis* not classed as conditional contraband may either escape altogether or be placed in a class regarded as more highly noxious. "All goods fit for purposes of war only, and certain other goods which, though fit also for the purposes of peace, are in their nature peculiarly serviceable to the enemy in war, on board a vessel which has a hostile destination, are absolutely contraband[3]." Into this class the crown claims the power of elevating any description of goods, subject to its treaty engagements, a condition which equally applies to the power of classing the less noxious goods *usus ancipitis* as conditional contraband[4]. The goods at present regarded by Great Britain as absolutely contraband are enumerated in the Admiralty *Manual*, and are arms and machinery for manufacturing them—ammunition and materials for it—gunpowder and its materials and gun-cotton—military equipments, clothing and stores—and naval stores, specified with great detail and including the requirements for building and equipping merchantmen as well as ships of war[5]. The present

[1] *Manual of Naval Prize Law*, prepared by Professor Holland on the foundation of that prepared by Sir Godfrey Lushington in 1866, and issued in 1888 by the authority of the Admiralty: Art. 63. "If the commander is satisfied that the goods on board the vessel are fit for purposes of peace exclusively, he should allow the vessel to proceed on her course": ib., Art. 66.

[2] *The Jonge Margaretha*, 1 C. Rob. 189, Scott 762.

[3] Admiralty *Manual*, Art. 61.

[4] Ib., Art. 65.

[5] Ib., Art. 62

list of "goods conditionally contraband" is given in another article, and is evidently intended to be read as subject on the one hand to the prize court's being satisfied of the destination of the goods for purposes of war, and on the other hand to the power of the prize court to condemn goods *usus ancipitis* not mentioned in the list if satisfied of their being so destined[1]. The difference of treatment made by British practice cannot be better or more shortly put than in the words of the Admiralty *Manual.*

82. The penalty for carrying goods absolutely contraband is, in general, the confiscation of such goods and also of any interest which the owner of such goods may have in the rest of the cargo.

84. The carriage of goods conditionally contraband, and of such absolutely contraband goods as are in an unmanufactured state and are the produce of the country exporting them, is usually followed only by the preemption of such goods by the British government, which then pays freight to the vessel carrying the goods[2].

The United States maintain the British view on contraband, which they inherited. The Jay treaty between the two countries, 1796, after giving an enumeration of contraband articles, meets "the difficulty of agreeing on the precise cases in which alone provisions and other articles not generally contraband may be regarded as such" by stipulating preemption, "with a reasonable mercantile profit," freight and demurrage, "whenever any

[1] Ib., Art. 64.

[2] In this article attention must be paid to the limitation contained in the word "usually." The cheeses going to Brest which have been mentioned furnish an example of the confiscation of conditional contraband, though the case was so far from being one of extreme culpability that Lord Stowell said: "as the party has acted without dissimulation in the case, and may have been misled by an inattention to circumstances to which in strictness he ought to have adverted, as well as something like an irregular indulgence on which he has relied, I shall content myself with pronouncing the cargo to be contraband without enforcing the usual penalty of the confiscation of the ship belonging to the same proprietor." It seems that the military importance of the supply will affect the question: *The Edward,* 4 C. Rob. 68, 70. The privilege allowed to the produce of the exporting country is not lost by the ship's not belonging to that country if the goods are its property: *The Apollo,* 4 C. Rob. 158. And for the purpose of that privilege neighbouring districts usually exporting through the Hanse towns were reckoned as one country with them: *The Evert,* 4 C. Rob. 354.

such articles so becoming contraband according to the existing law of nations shall for that reason be seized."

The school of thought whose view on contraband was embodied in the treaty of the Pyrenees objects to conditional contraband as opening a door to arbitrary behaviour on the part of belligerent governments and their prize courts, and declines to see an alleviation in bringing in neutral cargoes for preemption only, which in practice can scarcely fail to cause some molestation to neutral commerce, and in theory conflicts with the view that a neutral ought not to be touched at all when his innocence is admitted by not condemning him. In the treaties concluded under the influence of that school the enumerations of contraband have often included articles *usus ancipitis*, which were thereby exposed to confiscation when under the British system they would have escaped with preemption. And states which take this line, having deprived themselves of a class of conditional contraband in which to place branches of neutral commerce only occasionally in conflict with their belligerent interest, have been the more impelled to save that interest by excessive extensions of absolute contraband. Thus France in 1885, in spite of her traditional policy as to victuals, declared rice destined for any Chinese port north of Canton to be contraband of war, and justified herself, in answer to the British remonstrance, by the importance of rice in feeding the Chinese population as well as the Chinese armies[1]. Thus also Russia, which up to the time of her war with Japan did not admit conditional contraband, and which during the African conference at Berlin declared that she would refuse her consent to any inclusion of coal among contraband, issued at the commencement of that war a list of contraband including rice, provisions, horses, and "every kind of fuel, such as coal, naphtha, alcohol and other similar materials[2]." Afterwards

[1] *Parliamentary Papers, France No. 1, 1885.* Lord Granville notified that Great Britain would not consider herself bound by any decision of a French prize court giving effect to the declaration, but the case did not arise, as the war was short and shipments of rice appear to have been stopped by the threat.

[2] Russian Regulations of 28 February 1904, in the *London Gazette* of 11 March 1904. Provisions, horses and coal are all named as conditionally contraband in Art. 64 of the British Admiralty *Manual.*

however, in deference to the protests of Great Britain and the United States, she consented that rice and provisions should be regarded only as conditionally contraband, according to the use to which they were to be applied[1].

The Institute of International Law has taken a line not entirely in accordance with either of the schools thus far criticised. In 1895 a commission adopted a resolution approving conditional contraband when resulting from an immediate and special destination to the military or naval forces or the military operations of the enemy, and declared in advance by the belligerent government. But in 1896 the Institute as a whole substituted an emphatic condemnation of conditional contraband, at the same time proposing for a belligerent a right of sequestration or preemption, at his pleasure and subject to an equitable indemnity, over all goods, being on their way to a port of his enemy, which can serve equally for warlike or peaceful uses. The change was made in spite of strong opposition from the late Dr Perels, who held an eminent position in international law both from his talents and from his being a director in the German ministry of Marine. And we are thus entitled to say that if the doctrine which had its origin in France has become widely spread, at least it cannot claim to be regarded as that of the whole continent[2].

The treaties in which contraband of war is mentioned, except the great ones which launched the subject, present little interest except for ascertaining by what engagements each state is actually bound. Stipulations on contraband, like all political stipulations, are not extended beyond the original parties by a most favoured nation clause. Like all stipulations as to the rights of neutrals which do not take the form of declarations of law, such as the Declaration of Paris, they are cancelled by war between the parties. Even while they endure they have no effect unless one party is a belligerent and the other a neutral, and so many European wars have been general ones as seriously to affect the number of cases in which that situation

[1] Lord Lansdowne's letter of 2 November 1904 to the London Chamber of Commerce, in *Times* of the 4th.

[2] The discussions and resolutions of the Institute on contraband of war are in the *Annuaire*, vols. 13, 14, 15.

has existed. Whether these facts have led to their being rather carelessly entered into or from any other causes, the mind of England on the subject of contraband would be erroneously judged if her treaties during a century and a half were taken as showing it. What that mind really was is shown by her practice so far as she was free, and by her resistance to the Armed Neutralities. In fact England adopted the system of the treaty of the Pyrenees, sometimes with slight variations, in treaties of 1667 with Spain and Holland, and of 1677 with France—instances which are remarkable for coming so soon after the Anglo-Swedish treaty of 1661 of opposite character—and again in treaties of 1713 and 1786 with France. Nor were these the only instances, and Hall, speaking of the eighteenth century, says that treaties embodying the French doctrine of contraband bound England at different times with France, Spain, Sweden, Russia, Denmark and the United States[1]. The fact goes far to undermine the reliance placed by many jurists on treaties, as testimony to a public conviction on litigated points of international law.

Contraband at the Conferences of 1907 *and* 1909.

In these circumstances it is not surprising that the fourth committee of the Hague Conference of 1907 was unable to frame any scheme relating to contraband of war which should unite sufficient suffrages to justify its being brought before a full sitting of the Conference, but it is worth while to register the most important views which received expression in the committee. First of these, as most radical, must be placed the following British declaration made at the opening of the Conference.

> In order to diminish the difficulties encountered by neutral commerce in time of war, the government of H.B.M. is prepared to abandon the principle of contraband in case of war between the powers which may sign a convention to that effect. The right of visit would be exercised only in order to ascertain the neutral character of the merchantman.

In support of this declaration it was argued that profound doctrinal and practical differences exist as to contraband,

[1] § 238.

especially as to the treatment of things which are not absolute contraband in the strictest sense, and that a codification of the law was hopeless—that the progress of science has increased the number of things which in certain circumstances are of use in war though not absolute contraband in the strictest sense—that the complaints of neutrals on account of interference with the trade in things of that class have consequently increased—that the complexity of the cargoes carried by modern merchantmen of large size makes the search in them for contraband goods difficult and vexatious—that further difficulties would arise if a ship accused of carrying contraband was allowed to proceed on her voyage, the alleged contraband being transhipped or destroyed—that the destination of contraband to the enemy is often difficult of proof, and that under the doctrine of continuous voyage a belligerent might almost entirely interrupt neutral commerce—that for all these reasons the principle of contraband is the source of great damage to trade in non-contraband goods, and that neutrals demand indemnities so large that prize courts refuse them—that during the Russo-Japanese war only the tact of the parties concerned prevented serious international results arising from the principle of contraband—that belligerents derive no compensating benefit from that principle—and that to abandon it would be a work of peace and justice[1]. To these reasons we may add that the practical difficulty which during the South African war was found in enforcing the right of search at a distance from the suspected ship's destination had much diminished the value of the principle of contraband to belligerents[2]. The extent to which these considerations prevailed is shown by the vote taken in committee on a resolution to the effect of the British declaration, which was affirmed by the delegations of the following 25 states: Argentina, Austria-Hungary, Belgium, Brazil, Bulgaria, Chile, China, Cuba, Denmark, Great Britain, Greece, Italy, Mexico, Netherlands, Norway, Paraguay, Peru, Persia, Portugal, Salvador, San Domingo, Servia, Siam, Sweden and Switzerland. Negative

[1] The fact was also cited that the abolition of contraband was proposed by Mr Secretary Marcy of the United States, in a note of 28 July 1856 to the minister of Russia at Washington.

[2] See below, p. 292.

votes were given by the delegations of four great powers and one small state: France, Germany, Montenegro, Russia and the United States of America. And the delegations of five states abstained from voting: Spain, Japan, Panama, Rumania and Turkey. But Spain afterwards adhered to the resolution.

The fourth committee having decided on 24 September not to pursue the matter further at the then Conference, Sir Edward Fry issued to the delegations which had supported the British proposal an invitation to a meeting, accompanied by a draft to which he proposed that they should all adhere, declaring that in case of war between any two or more of the contracting powers, no non-contracting power being a party,

1. Goods belonging to a subject of a neutral contracting power on board neutral or enemy ships cannot be condemned as being contraband;
2. The flag of a neutral contracting power covers all the goods on board.

The meeting was held, nearly all the delegations which had voted affirmatively or adhered being represented. But of the 21 delegations thus assembled besides the British, only that of Haiti supported the latter in being ready to sign. All the others supported or acquiesced in the view which M. de Kapos Mere (Austria-Hungary) and Count Tornielli (Italy) took the lead in expressing. Their votes had been given as a part of the proceedings of the Conference, of which the principle was that unanimity or an approach to it was necessary for a result[1]. To sign at the Conference a convention outside it would damage the Conference, and might prevent the powers from agreeing to another. Thus the partial realisation of the abolition of contraband, by agreement between the powers desiring it, was defeated.

The proposal next most radical after the British in the relief offered to neutral commerce was that of the United States, on behalf of which Admiral Sperry read a formal declaration that they were in favour of the complete abolition of conditional contraband. After this comes the Brazilian proposal, which qualified the abolition of conditional contraband by a permission

[1] *Qu'on ne saurait agir qu'à l'unanimité ou à la presqu' unanimité*: M. de Kapos Mere. *Courrier de la Conférence*, no. 89, 26 September, 1907.

to belligerents to sequestrate or preempt[1] certain named articles —victuals, coal, raw cotton and men's clothing—when destined either for an enemy port or for a neutral one clearly proved to be a stage (*étape*) towards an enemy destination. The German proposal maintained conditional contraband when diplomatically declared in advance by the belligerent government, as might have been expected from the line which we have mentioned as that of the late Dr Perels[2], but gave to the doctrine of continuous voyage only the limited support which it might derive from the admission of a peremptory presumption against the goods when addressed to the authorities of the enemy power or to a contractor with it (*fournisseur militaire*), or when destined for a fortified place of the enemy's country or some other place serving as a base (*point d'appui*) for his forces. The least favourable proposal to neutral commerce was that of France, which limited absolute contraband rather strictly, but, while nominally proclaiming the freedom of neutral commerce in all things not absolutely contraband, allowed to the belligerents the power of "restraining its freedom" by a diplomatic notification of the things which they intend to intercept, these to be confiscated if their hostile purpose (*but nettement hostile*) is proved, otherwise to be preempted. It may be said of this, as of the very similar proposal of the Institute of International Law[3], that the excessive interference with neutral commerce which it would authorise would not be compensated by an indemnity to be obtained only after delay and often also after litigation. From M. Renault's speech it appeared that France maintained the doctrine of continuous voyage, and from M. Kriege's that Germany desired to abolish it.

Besides receiving the communication of the views here explained, the Committee of the Hague Conference of 1907 succeeded so far as to determine on the maintenance of the distinction between absolute and conditional contraband, and to draw up a list of articles of the latter character, which was the result of mutual concessions.

[1] I apologise for this word, which it is difficult to avoid without circumlocution.

[2] See above, p. 286.

[3] See above, p. 286.

The question next passed into the hands of the Conference of London, at which there was no renewal of a proposition for abolishing contraband. That conference, in the Declaration resulting from it, gave lists of objects and materials to be regarded respectively as absolute and conditional contraband without special notice (*de plein droit*), the latter identical with that of the Hague committee of 1907, discussion on which it did not seem wise to reopen. Power was reserved to belligerents to add to the former list things exclusively used for war (Art. 23), and to the latter things susceptible of use either for war or for peaceful purposes (Art. 25). And the novel and important step was taken of giving a list of things incapable of being declared contraband (Art. 28), in which were included the raw materials and yarns of the textile industries.

Penalty for the Carriage of Contraband of War.

The penalty for carrying contraband goods, so far as it was necessary to mention it in order to explain the difference between the British and French views of the general subject, with which the existence of a class of cases visited only with preemption is intimately connected, has been already discussed[1]. The Admiralty *Manual* of 1888 further deals with it as follows.

83. The vessel which carries [contraband] goods, if not owned by the owner of such goods, is not confiscated but forfeits her freight for such goods and all right to expenses the result of her detention.

85. The penalty for carrying contraband goods with simulated papers, or in disregard of express stipulations by treaty, is confiscation not only of the contraband goods but also of the vessel, and of any interest which her owner has in the rest of the cargo.

87. A vessel which is herself contraband is liable to be confiscated, together with such part of her cargo as belongs to her owner.

The vessel is also confiscated if she resisted capture or search, or if her owner was privy to the carriage of the contraband goods though not their owner. She is confiscable in Germany and Denmark if all her cargo, in France if three fourths of her cargo, are contraband; by the Italian code of mercantile marine when any part is confiscable contraband; by the Declaration of

[1] Above, p. 284.

London, Art. 40, if the contraband, reckoned either by value, weight, volume or freight, forms more than half the cargo.

The time during which the penalty for the carriage of contraband is enforceable is, in general, from the moment of the ship's quitting port with the goods having a hostile destination on board to that when the goods are unloaded. On the return voyage the ship is free. But where a ship succeeded in carrying contraband to a hostile destination with false papers, and was taken on the return voyage, Lord Stowell and Sir William Grant condemned her with her return cargo, whether it had been purchased with the proceeds of the outward contraband cargo or several intermediate transactions had been interposed; and the Admiralty *Manual* approves[1]. Gessner on the other hand strongly objects[2], and in my judgment he is right. It is contended that in such cases the offence of the ship is not deposited with the goods, but the offence of the ship is not punished on the return voyage when it consists in the shipowner's being privy to the carriage of the contraband, and it is difficult to see how the use of false papers, though a graver offence, brings in a different principle.

At the other limit of the time during which the penalty is enforceable, namely its commencement, there is no legal difficulty but there is one of convenience. When the penalty may be enforced there is a right of visit and search, the exercise of which at a great distance from the port to which the contraband, if any, is suspected to be in course of transport, may seriously disturb commerce bound to a variety of destinations. The distance from the port of destination, Delagoa Bay, at which Great Britain claimed the right during the South African war, the cargo of the mail steamer *General* being examined at Aden, contributed with other incidents to a diplomatic discussion with Germany. In the course of it the German

[1] Art. 80, quoting *The Nancy*, 3 C. Rob. 122 and *The Margaret*, 1 Acton 333. Even independently of false papers Lord Stowell held that "in distant voyages the different parts are not to be considered as two voyages but as one entire transaction," where those parts are "formed upon one original plan, conducted by the same persons and under one set of instructions, *ab ovo usque ad mala*": in *The Nancy*, 3 C. Rob. 126. This doctrine is ignored by Art. 80, rightly as I think.

[2] P. 141.

chancellor, Prince von Bülow, speaking in the Reichstag on 19 January 1900 and reviewing the chief points of the law of contraband, said: "The right of visit and search naturally applies to waters which are not too distant from the theatre of war. For mail steamers there are at present no special understandings." The incident passed off, the British government agreeing that there should be no search at places more remote than Aden. It would scarcely be possible to limit the distance by any general rule, and it must perhaps be always left to the discretion of the belligerent and neutral governments interested.

Continuous Voyage and Rule of War of 1756.

We have repeatedly had to speak of a destination to the enemy as being a condition of goods being contraband, and subject as such to confiscation or preemption. It might be thought clear enough that the destination in question is simply that of the goods, and abroad this has always been the most general opinion. But in England it has been generally maintained by systematic writers that a destination to a hostile port of the ship which carries the goods is further necessary for the belligerent's right to interfere with the latter. If she is bound for a neutral port—at least if such is her ultimate destination and not merely to be used by her as a port of call—the goods are not within the prohibition of contraband and cannot be captured, although their destination may be to the enemy. With this we cannot agree. The difference between the doctrines will appear from the following considerations.

Goods on board a ship destined to a neutral port may be consigned to purchasers in that port or to agents who are to offer them for sale there, in either of which cases what further becomes of them will depend on the consignee purchasers or on the purchasers from the agents. Such goods before arriving at the neutral port have only a neutral destination. On arriving there they are, in Lord Stowell's language, imported into the common stock of the country. If they ultimately find their way to a belligerent port, or to a belligerent army or navy, it will be in consequence of a new destination given them, and this notwithstanding that the neutral port may be a well known

market for the belligerent in question to seek supplies in, and that the goods may notoriously have been attracted to it by the existence of such a market. The consignors of the goods to the neutral port may have had an expectation that they would reach the belligerent, but not an intention to that effect, for a person can form an intention only about his own acts, and a belligerent destination was to be impressed on the goods, if at all, by other persons. Therefore it is not contended by any one that on the way to the neutral port there will be a right of capture, whatever the character of the goods.

On the other hand goods on board a ship destined to a neutral port may be under orders from their owners to be forwarded thence to a belligerent port, army or navy, either by a further voyage of the same ship, or by transhipment, or even by land carriage. Such goods are to reach the belligerent without the intervention of a new commercial transaction, in pursuance of the intention formed with regard to them by the persons who are their owners during the voyage to the neutral port. Therefore even during that voyage they have a belligerent destination, although the ship which carries them may have only a neutral one. If that destination is combined with the character required for their being contraband the mischief exists against which a belligerent is allowed to protect himself, his cruiser falls in with the *corpus delicti* at sea, which is the recognised arena for his self-protection, and the voyage of the goods to the neutral port must be regarded in law as being continuous with their voyage or other transit from that port to their final destination. *La destination pour l'ennemi est présumée lorsque le transport va à un de ses ports, ou bien à un port neutre qui, d'après des preuves évidentes et de fait incontestable, n'est qu'une étape pour l'ennemi comme but final de la même opération commerciale*[1].

The first recorded notice by a British prize court of the possibility that voyages distinct in fact may be continuous in law occurs in connection with what is called the rule of the war of 1756, which for that reason, though having no other connection with the doctrine of contraband, may be conveniently

[1] Resolution of the Institute of International Law in 1896, 15 *Annuaire* 231.

dealt with in this place. "During the war of 1756," if we may borrow Wheaton's words, "the French government, finding the trade with their colonies almost entirely cut off by the maritime superiority of Great Britain, relaxed their monopoly of that trade, and allowed the Dutch, then neutral, to carry on the commerce between the mother country and her colonies under special licenses or passes, granted for this particular purpose, excluding at the same time all other neutrals from the same trade[1]." This was held by the British prize court to amount, on the part of the Dutch acting on the licenses, to be such an identification of themselves with the enemy that both ships and cargoes were captured and condemned; nor in our opinion can any fault be found with that view, which commends itself both to Wheaton and to Hall, unless it should be held that a merely implied identification with the enemy is now excluded by the Declaration of Paris. Before the outbreak of the war of 1778 France, probably to avoid similar consequences, announced that trade with her West Indian colonies would thenceforth be permanently open: accordingly the neutrals who engaged in it were not interfered with by Great Britain, except so far as they might be carrying contraband. "In 1793 however, the French having opened their coasting and colonial trade to neutrals, the latter were not only forbidden by England to carry French goods between the mother country and her colonies, but they were also exposed to penalties for conveying neutral goods from their own ports to those of a belligerent colony, or from any one port to another belonging to the belligerent country[2]."

This extension of the practice of 1756 to all the trade which was not open to neutrals in time of peace, though commonly included in the term "rule of the war of 1756," has always been generally condemned both on the continent and in the United States, in spite of the great authority of Lord Stowell. The reasons adduced for it are variations of circumstance on the theme that all trade strengthens a belligerent. Or if they are based on the familiar plea that the true test of a trade's being compatible with neutrality is its being carried on during peace,

[1] *Elements*, § 508, Dana's numbering.

[2] Here we borrow Hall's compendious statement: § 234.

then it must be remembered that belligerents have never admitted that plea in a neutral's favour, so as to exempt articles belonging to his ordinary trade from being classed as contraband, and that therefore they ought not to invoke it when it tells against him. We agree with Hall in condemning the extended doctrine, of which the Declaration of Paris seems sufficient to prevent any application in future, even were not the colonial trade of the world as open as it now generally is.

It was in connection with the extended rule of the war of 1756 that Lord Stowell and Sir William Grant applied the principle of continuous voyage. Neutrals carrying on the trade between an enemy colony and its mother country would unship the cargo brought from the former at a neutral port, reload it —perhaps with some addition, or after payment of the customs duties in order to give further colour to the pretence of importation there—and then complete its transport to the enemy mother country on the same or another ship. Condemnation followed on capture during the latter part of the voyage or transport, which was held to be continuous with the former part, so as to constitute one transport between the places between which the trade was prohibited by Great Britain to neutrals[1]. The same principle must have applied if the capture had been made during the first part of the transport, supposing the intention to be proved, but the case does not seem to have happened. This being so, it seems impossible to believe that Lord Stowell would have objected to applying the principle of continuous voyage to the carriage of contraband. And indeed in *The Rapid*[2], which was the case of a ship carrying a despatch addressed to a hostile minister, he said: "It is to be observed that where the commencement of the voyage is in a neutral country and it is to terminate at a neutral port, or as in this instance at a port to which though not neutral an open trade is allowed, in such a case there is less to excite his [the master's] vigilance, and therefore it may be proper to make some allowance for any imposition which may be practised upon him." This distinctly gave it to be understood that the carriage of

[1] *The Maria,* 5 C. Rob. 365; *The William,* ib. 385; *The Thomyris,* a case of transhipment, Edwards 17.

[2] Edwards 228.

despatches—which is at least analogous to that of contraband goods if the despatches, being things and not persons, are not rather contraband than analogues of contraband—would not necessarily be held innocent because the ship's voyage was to terminate at a neutral port. We cannot therefore agree with those who maintain that Lord Stowell considered the important destination to be not that of the goods but that of the ship, because he happened to say that "the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port." In the case before him the destination both of the ship and of the goods had been to an enemy's port, but on learning that that port was blockaded the master changed his course for a neutral port, and no proof was offered that the owner of the goods had any agent there charged with forwarding them to the enemy[1]. And now the British government has adopted the doctrine of continuous voyage for searching for contraband, during the South African war, ships bound for the Portuguese neutral port of Lourenço Marques in Delagoa Bay, from which the goods would proceed by inland carriage to the enemy South African Republic[2].

In the United States during the civil war the carriage of contraband was generally presented to the courts in connection with blockade-running, to which the doctrine of continuous voyage does not apply. The offence of blockade-running, consisting in the attempt to communicate with a prohibited port and not in the introduction of a prohibited class of goods, is essentially one of the ship, and not an offence of the goods except as derived from that of the ship. If a ship is bound for

[1] *The Imina*, 3 C. Rob. 167. The judgments of the court of Common Pleas on insurances effected during the American civil war were in favour of the doctrine of continuous voyage: *Hobbs v. Henning*, 17 C. B., N. S., 791, 34 L. J., C. P., 117; *Seymour v. London and Provincial Marine Insurance Company*, 41 L. J., C. P., 193, confirmed in the Exchequer Chamber, 42 L. J., C. P., 111. See the former judgment explained in articles by me, 15 L. Q. 424, and by Mr E. L. de Hart, 23 L. Q. R. 199.

[2] These ships were the *Bundesrath*, the *Herzog* and the *General*. No contraband being found in them, indemnities were paid. The correspondence between Great Britain and Germany about them is in the Bluebook Cd. 33 (1900), and extracts from it are given by Mr J. Dundas White in 17 L. Q. R. 12.

a neutral port, not as a port of call, no blockade-running has been attempted by her, and her cargo, still innocent, cannot connect her with any such attempt which the ship into which it may be removed may afterwards commit. The United States judgments however did not always distinguish sufficiently between the two conditions. But in the case of *The Peterhoff*, which was independent of blockade, since the sea carriage of the goods was to terminate at the Mexican port of Matamoras, from which there was communication with the Confederate territory by land or inland navigation, it was clearly laid down that the confiscation of the goods depended on whether they were intended to make part of the general stock in trade at Matamoras or for further transport to the enemy in the vicinity[1]. In France the doctrine of continuous voyage was applied to contraband during the Crimean war in the case of the *Frau Howina*[2]. In Italy it was judicially affirmed during the Abyssinian war in the case of the *Doelwyk*[3], though confiscation was refused on the ground that before the trial peace had been established. In Germany it has the support of Gessner[4] and Perels[5], and of the Prussian regulations of 1864[6], although the German government, in complaining of the search for contraband on the way to Delagoa Bay, attempted to show that British authority was against it. On the whole then it must be recognised as the reigning view that the critical destination in matter of contraband is that of the goods and not that of the ship.

The Declaration of London, however, expressly admits the sufficiency of destination of the goods to the enemy in the case of absolute contraband (Art. 30), but expressly requires the enemy destination of the ship in the case of conditional contraband (Art. 35), except in the case mentioned in Art. 36.

[1] See *The Bermuda*, 3 Wallace 514; *The Stephen Hart*, Blatchford's Prize Cases 387, 3 Wallace 559, Freeman Snow 509, Scott 852; *The Springbok*, 5 Wallace 1; *The Peterhoff*, 5 Wallace 28, Freeman Snow 465.

[2] Calvo, éd^{n} 3^{me}, § 2476; éd^{n} 4^{me}, § 2767; 17 L. Q. R. 194.

[3] *Archives Diplomatiques*, January 1879, p. 81; 4 *Revue Générale de Droit International Public* 157, 298.

[4] *Le Droit des Neutres sur Mer*, p. 137.

[5] *Das Internationale Oeffentliche Seerecht*, p. 159; 14 *Annuaire de l'Institut de Droit International* 63.

[6] As pointed out by Mr E. L. de Hart in 17 L. Q. R. 197.

Export of Contraband and Convoy.

We have seen that the export or carriage of contraband of war, like blockade-running, is in general left by international law to be repressed by the belligerent whom it damages[1]. A state which attempted to prevent it by its own law would not only be gratuitously outrunning its neutral duty, but would be assuming a task very difficult to perform without so strict a supervision of its subjects' business as in most countries would be felt to be intolerably onerous. In return it would scarcely fail to meet from belligerents with complaints of imperfect and partial fulfilment of the duty undertaken, which it would be more difficult to answer than it would have been to maintain the true line of neutral conduct. Nevertheless some states have entered on the dangerous course. On the outbreak of the Spanish-American war the export to the belligerents of every thing capable of immediate use in war was prohibited by the Netherlands, and of material of war by Brazil; and in the course of that war the German government searched in the Elbe a Spanish ship supposed to be loaded with arms for use in Cuba[2]. So also on the outbreak of the Russo-Japanese war Sweden notified the liberty of the belligerents to export from her all goods "except those which are considered to be contraband of war." These steps may have been prompted by what I should hold to be a mistaken caution on the part of powers not of the first rank, or by that view of the position of individuals in the question which I have rejected[3].

When however the export of contraband amounts in its peculiar circumstances to participation in a specific operation of war, it no longer falls within the conditions under which a state can tolerate it without a disregard of the neutrality due from its territory. We have seen this in the case of despatching ships in belligerent service or control, and a similar case is presented by the export of coal to a war fleet at sea. That

[1] See above, pp. 195–197, 205. For the legality in England and the United States of contracts entered into for the purposes here in question, see *exp. Chavasse, re Grazebrook*, 34 L. J., N. S., Bk. 17; *The Helen*, 35 L. J., N. S., Adm. 2; *Seton v. Low*, 1 Johnson 1; Scott 798, 799 n.

[2] *A. D. White's Autobiography*, 168, 169.

[3] See above pp. 196, 197.

would amount to a participation in the operations which the supply of coal rendered possible, and Great Britain accordingly prohibited the export of coal to the French fleet in the North Sea during the war of 1870, but refused to prohibit its export to France, though strongly pressed to do so by Germany, which power did not place the demand so much on general grounds as on the equally inadmissible claim to a benevolent neutrality on the part of Great Britain.

Closely connected with the question of government interference with the export of contraband is that of convoy. So far as a belligerent is empowered by the convention of nations, tacitly contained in customary international law, to repress any traffic at sea, he must be authorised to visit and search the ships which he has reasonable ground to suspect of being engaged in that traffic. An important field for the exercise of this authority, as claimed and practised by British cruisers and privateers, was at one time the search for enemy's goods on board neutral shipping, but since the Declaration of Paris has freed such goods from capture the search for contraband is the chief, though not quite the only, remaining field for it. As early as 1653, during a war between England and Holland, Queen Christina of Sweden employed her ships of war in convoying Swedish merchantmen, with instructions "to decline in all possible ways that they or any of those that belong to them be searched." And from that time downwards the right of convoy has been in dispute, often by force, between Great Britain on the one hand and the Baltic powers and the Netherlands on the other hand. Those who claim the right require that the declaration of the commander of a ship of war shall be accepted by the belligerent commanders whom he meets, as sufficient evidence that the merchantmen sailing under his protection have only innocent goods on board, and are not avowedly or constructively in the enemy's service, or engaged in any enterprise, such as blockade-running, which a belligerent is entitled to prevent. This view has obtained so wide a currency that now the United States, France, Germany, Austria, Spain, Italy, Japan and the Baltic powers provide by their naval regulations that the declaration of a convoying officer shall be accepted. Great Britain on the other hand adheres to the practice upon which she has always acted.

In defence of the British contention it may be urged that, as long as international law does not make it the duty of a neutral state to prohibit the export of contraband, or otherwise to supervise in belligerent interest the commercial activity of its subjects, so far as that activity does not involve the use of its territory by a foreign power or its agents—so long a belligerent is not bound to accept the offer of a neutral state to undertake such supervision, and to substitute its own responsibility for that of the individuals with whom international law has left him to deal. Further, since any administrative procedures which the neutral government might adopt in its ports and markets would in the long run be conducted by methods of routine, and would usually be unaccompanied by such knowledge of suspicious circumstances as self-interest would prompt a belligerent to be diligent in acquiring, the declaration of the convoying officer would in practice mean little more than that the papers of the vessels under his protection showed no cause for belligerent interference on their face. Again, in the matter of contraband, the system of convoy would in effect compel the belligerent to be content with the neutral's definition of the articles to be considered as such. In truth the efforts of the Baltic powers to establish that system have been closely connected with their efforts to eliminate the naval materials which they produced from the list of contraband. But, well grounded as the British objection to the system of convoy appears to me, it must be admitted that in the present state of foreign opinion it may be difficult to maintain it in practice. The Declaration of London prohibits the search of neutral vessels under the convoy of their flag: Art. 61.

So long however as resistance by a neutral merchantman to search, and even sailing with instructions to make such resistance, is held in England a cause for condemning both her and her cargo, sailing under neutral convoy, whether of the merchantman's own or of any other neutral state, must carry the same consequence, because it is thereby sought to profit by the convoying ship's unlawful employment of force[1]. Whether a neutral merchantman incurs condemnation by attaching herself to a war fleet or ship of the enemy, thereby resorting to what is

[1] Admiralty *Manual*, Arts. 147, 148, 149; *The Maria*, 1 C. Rob. 340, Scott 858; *The Franklin*, 2 Acton 106; *The Elsebe*, 5 C. Rob. 173.

called belligerent convoy, is a question on which the British and United States prize courts have differed. The former decide in the affirmative, on the ground that by so doing she seeks to profit by the enemy's employment of force. In the United States the negative has been held, on the ground that the enemy's force of which advantage is sought to be taken is lawful. Each answer must be and is given in the same sense in the case of a neutral cargo embarked in an armed ship of the enemy, but the British court has held that neutral cargo does not suffer for being embarked in an enemy private ship which makes resistance[1].

Analogues of Contraband: Men and Despatches.

When a neutral ship is chartered by a belligerent government or its agent for the purpose of conveying men or despatches, she is subject to capture and confiscation as being in belligerent service, so that there is no need to invoke an analogy to the law of contraband, and the importance of the men or despatches conveyed is immaterial[2]. Where the service of a neutral ship was obtained under duress applied by a belligerent, Lord Stowell equally condemned her[3]; but it is widely, and in my opinion justly, thought that this was wrong, since the condemnation cannot operate as a lesson to neutrals in a similar case.

When a neutral ship has not placed herself in such a relation to a belligerent government as to be virtually in its service, and has a belligerent's men or despatches on board her, either by special contract or because advantage has been taken of her functions as a regular passenger ship or of the mail bags which she carries, the question as it affects men must be kept separate from that concerning despatches. Men present no real analogy

[1] For Great Britain, Admiralty *Manual*, Arts. 147, 150; *The Catharina Elizabeth*, 5 C. Rob. 232; *The Fanny*, 1 Dodson 443. For the United States, *The Néréide*, 9 Cranch 441, Scott 884, in which Chief Justice Marshall delivered the opinion of the majority, Justice Story dissenting; *The Atalanta*, 3 Wheaton 409, Scott 894 note.

[2] *The Orozembo*, 6 C. Rob. 430, Scott 785. The result will be the same if she is chartered as a transport: *The Friendship*, 6 C. Rob. 420; or for any other service. And see above, p. 175.

[3] *The Carolina*, 4 C. Rob. 256, alluded to in the judgment in *The Orozembo* as "the Swedish vessel." And see above, p. 176.

to contraband, although they as well as despatches are often spoken of as its analogues. Men cannot be forwarded like goods, in pursuance of an intention formed about them by some one else. All that can be done is to give them facilities for locomotion, and the question is what facilities of the kind the customary law of nations does not allow a neutral ship to afford. Accordingly the carriage of men has not been usually coupled in treaties with the carriage of contraband but with the clauses stipulating the rule "free ships free goods," in which it is common to find it laid down that the freedom of the flag covers all persons on board except those in the enemy's military service. And by the resolutions of the Institute of International Law on "transport service," which it passed at the same time as those on contraband, the only persons whom it is forbidden to neutrals to carry are those in a belligerent's military service and his diplomatists credited to his ally[1]. The British Admiralty *Manual* includes in the prohibition "civil officials sent out on the public service and at the public expense[2]." The persons carried in the *Orozembo* were three military men and two going to be employed in civil capacities in a colonial government of the enemy. Lord Stowell did not feel it necessary to determine whether the principle on which he condemned her would apply to the latter alone, but he thought it reasonable that it should apply whenever the enemy thought it worth while to send out such persons at the public expense. I agree in theory, and that condemnation of the ship should follow, when the enemy has sent out the persons, military or civil, by special arrangement. But that is a case no longer likely to happen, so abundant have regular passenger ships become in all seas. When the persons travel as passengers in the ordinary course, it must be remembered that the customary right to capture even military officers has not been accompanied by any relaxation of the duty to send every neutral ship that is interfered with in for adjudication, and that to arrest a passenger liner and send her in for adjudication would be an intolerable nuisance. The duty referred to cannot properly be relaxed, for those who capture the men cannot be allowed to be judges in their own cause, and an adjudication

[1] 15 *Annuaire* 123. [2] Art. 89.

on the ship is the only means of submitting their act to legal decision.

Accordingly when Messieurs Mason and Slidell, sent by the Confederate States to attempt the opening of diplomatic relations with Great Britain and France, were taken by a United States naval commander out of the British passenger steamer *Trent* on a voyage between two neutral ports, the United States surrendered them to Great Britain on the ground that the *Trent* had been allowed to pursue her course. There remains the nuisance which bringing her in would have caused, and this has suggested that the right to capture any persons whatever, military or civil, being carried in a neutral ship bound for a neutral port, had better be abandoned, except when the ship is in the enemy's service either openly by hiring, or virtually by rendering such service as is rendered by a transport. Mr Mountague Bernard, who made this suggestion, with which I agree, added: "The number of the persons conveyed, the nature of their employment, their importance, their immediate or ultimate destination, may then become material elements of proof; and there should be evidence of intention, or of knowledge from which intention may be reasonably inferred, on the part of the owner or his agent the master[1]." Where the proof is thus fully made, the inconvenience of interrupting the regular passenger service by sending the ship in for adjudication must be faced; but where it can be made, there can hardly fail to have been indications warning the public that on that trip she was not acting in her ordinary capacity.

Despatches, on the other hand, being things, present a real analogy to contraband: they might have been classed as such, but for the attention having been concentrated on the commercial aspect of contraband. As early as the year 1636 the right of the French to visit English ships, in order to prevent the carriage of their enemies' "advices and directions," was admitted[2]. The rule is that carrying the despatches of the enemy government, unless the master can show that he was justifiably ignorant of their noxious character, is a cause of confiscation for the ship, and for the cargo so far as belonging

[1] *Neutrality of Great Britain during the American Civil War*, p. 224.

[2] Robinson's *Collectanea Maritima*, p. 46, quoting 2 Sydn. Lett. 436.

to the owners of the ship, *ob continentiam delicti* as Lord Stowell expressed it[1]. An exception is made for despatches sent in order to maintain communication between the enemy state and neutral ones, for such communication is the right of the neutral states, however valuable it may be to the enemy. On this principle the carriage of despatches from the enemy government to its own consul in a neutral country, not known to contain any thing hurtful to England, was held innocent, since the office of a consul relates to international trade, in which the country where he is stationed is interested as well as that to which he belongs[2]. But despatches sent in the course of communication between different parts of the enemy's dominions are held to be noxious even if they relate only to civil business[3]. To paralyse the enemy's government in all its operations is a legitimate means of compelling it to submit to the terms of peace demanded. Even private letters may be "of an injurious tendency," and so "give the captors the right of enquiry," apparently whether they ought not in the circumstances to be regarded as really public communications, for which purpose they may bring in the ship carrying them; but if the communications are not found to be public she will not be condemned[4].

Where the despatches which under the general rules thus far laid down would be ranked as noxious are carried in neutral mail bags, they now have the protection of the Hague regulations as to postal correspondence at sea, above, pp. 184, 185; but it may be interesting to show how far opinion had already called for that protection. I therefore retain what in the first edition of this work was said of despatches so circumstanced, namely that it is worthy of serious consideration whether those general rules at all apply to them. Since neither the master nor the owners of a ship have any knowledge of the contents of a mail bag put on board her by a postoffice, the guilty

[1] *The Atalanta,* 6 C. Rob. 440, Scott 780; *The Rapid,* Edwards 228, Scott 782. The master's ignorance will not be justifiable unless he has made "the utmost exertions of caution and good faith": *The Susan,* 6 C. Rob. 461 note.

[2] *The Madison,* Edwards 224, Scott 785.

[3] *The Atalanta,* u. s.

[4] Lord Stowell in *The Caroline,* 6 C. Rob. 469.

knowledge or *mens rea* necessary for the condemnation of the ship must always be wanting in that case. There can therefore be no justification for bringing in the ship for adjudication, on the sole ground of her carrying such bags; and examination of the bags on board her without bringing her in cannot be justified. During the American civil war mail bags found in ships searched on suspicion of blockade-running or carrying contraband were the subject of correspondence between the British and United States governments. Earl Russell wrote, 10 October 1862:

> Her Majesty's government cannot doubt that the government of the United States are prepared to concede that all mail bags, clearly certified to be such, shall be exempt from seizure or visitation, or that some arrangement shall be made for immediately forwarding such bags to their destination, in the event of the ship which carries them being detained. If this is done, the necessity for discussing the claim, as a matter of strict right, that Her Majesty's mails on board a private vessel should be exempted from visitation or detention, might be avoided.

Mr Seward, by way of reply, gave the following directions, addressed to the Secretary of the Navy, 31 October 1862:

> It is thought expedient that instructions be given to the blockading and naval officers that, in case of capture of merchant-vessels suspected or found to be vessels of the insurgents or contraband, the public mails of any friendly or neutral power, duly certified and authenticated as such, shall not be searched or opened, but be put as speedily as may be convenient on their way to their designated destinations. This instruction however will not be deemed to protect simulated mail bags, verified by forged certificates or counterfeited seals[1].

[1] M. Bernard's *Neutrality of Great Britain during the American Civil War*, pp. 322, 323.

CHAPTER XI.

THE OPEN QUESTIONS OF NAVAL WAR.

The conversion of Merchantmen into Ships of War.

It remains to notice some questions of the law of naval war which it was found impracticable to settle either at the Hague Conference of 1907, or at the Conference of London in 1909, or which await the ratification of the Declaration of London if a settlement of them is comprised in it. First of these may be taken that referred to as follows in the preamble of the Hague Convention on the conversion of merchantmen into ships of war, to which it must be noticed that the United States have not become a party.

Considering that in view of the incorporation in time of war of merchant ships in the fighting fleet it is desirable to define the conditions subject to which that operation may be effected;

That, however, the contracting powers having been unable to come to an agreement on the question whether the conversion of a merchant ship into a ship of war may take place on the high seas, it is understood that the question of the place of such conversion remains outside the scope of this convention and is in no way affected by the following rules.

Thus restricted the clauses of the convention do no more than give effect to the understanding stated above, p. 177, as generally existing with regard to the meaning in which privateers are prohibited in the Declaration of Paris. A converted merchantman is not to have the rights and obligations of a ship of war unless she is placed under the direct authority, immediate control, and responsibility of the power whose flag she flies. She and her commander are to figure on the navy list of that power. But it was not about any question of privateering

that the dispute arose on which it became necessary that the powers should agree to differ.

During her war with Japan Russia caused the *Petersburg* and the *Smolensk*, vessels belonging to the Black Sea part of what is called her volunteer fleet, to pass the straits under her mercantile flag, which in the Mediterranean they discarded for the war flag and captured the British ship *Malacca* under the latter. This was justly objected to as an unpermissible evasion of the conventions which prohibit the passage of the Dardanelles and Bosphorus by ships of war while the Porte is at peace, but was more summarily condemnable if it can be maintained that the conversion of a merchantship into a ship of war cannot take place in the open sea. At the Conference of 1907 Great Britain proposed the division of ships of war (*vaisseaux de guerre*) into the classes of fighting and auxiliary ships (*vaisseaux de combat* and *bâtiments auxiliaires*), defining the former as follows:

> The term "fighting ship" comprises every ship flying a recognised flag, armed at the expense of the state for attacking the enemy, and of which the officers and crew have been duly authorised for such attack by the government of the state to which they belong. It shall be prohibited for any ship to assume the foresaid character after her departure from a port of her state, or to lay it down except after reentering a port of her state.

The Italian and Dutch proposals were to the same effect as the British with regard to the place of conversion, but Japan proposed that a merchantman may be converted into a ship of war either in the ports or territorial waters of her state, or in those occupied by the military or naval forces of her state.

In the discussion which followed the German and Russian delegations maintained that conversion ought to be allowed in the open sea, as being a place subject to no jurisdiction foreign to that of the converting state, and that since it is permitted to turn captured ships into ships of war in the open sea, the same ought to be allowed for one's own merchantmen. In answer it was pointed out that neutrals would be exposed to the consequences of the change of a ship's character made in the open sea without their having an opportunity of knowledge, and that a merchantman which had benefited by the hospitality of a neutral port ought not afterwards to abuse it by a

conversion. It must be confessed that the former argument is difficult to refute from the side of the *lex lata*, but the latter argument is so strong on the side of the *lex ferenda* that a neutral state aggrieved by the consequences of a conversion on the high seas would in all probability refuse to the new ship of war admission to her ports. The Conference of London in 1909 equally failed to reach an agreement.

Destroying Prizes at Sea.

The capture of enemy's property at sea ousts the enemy owner. The judgment of a prize court may be necessary for securing the discipline of the capturing country's fleet, or formerly of its privateers, and for seeing that neutrals are not unjustly despoiled, but it is not necessary against the enemy, nor does the latter's title await in suspended animation the chance of being restored by recapture. Therefore the enemy has no cause of complaint if his property is destroyed at sea instead of being brought in for adjudication. On similar principles a neutral has no cause of complaint if property of his is destroyed at sea which, if brought in, must have been condemned under the law of blockade or contraband. For him, too, the judgment would only have verified a forfeiture imposed by the facts. But when neutral goods not impeachable under the law of blockade or of contraband are found in an enemy ship, and the belligerent cannot tranship them and forward them to their destination, it might be thought that he must forego a right to destroy his enemy's property which he could not exercise without also destroying the property of an innocent owner, or at least, supposing the destruction to be justified by the plea of strong necessity, that he is bound to indemnify the neutral. And in any case of the destruction of a ship, enemy or neutral, it would be the destroyer's duty to save the men and to preserve all the papers and other evidence which might assist a neutral claimant in proving that innocent property of his had been destroyed.

But this obvious view has not in all points been generally received. During the Franco-German war two German ships, the *Ludwig* and the *Vorwärts*, were burnt by their French captors because the latter had so many prisoners on board that they

could not safely spare a prize crew. The neutral cargo-owners, against whom no offence of contraband or blockade-running was alleged, claimed compensation, alleging the immunity of neutral goods under the enemy flag by the Declaration of Paris; and the decision was against them both in the court of first instance and in that of appeal[1]. It was said that the effect of the Declaration of Paris is only that a neutral is entitled to the restitution of his goods embarked in an enemy ship, or to receive the sum for which they may have been sold, but not that he can demand an indemnity for damage caused either by a legally good capture of the ship or by acts of war which may have accompanied or followed the capture. And the decision is approved by Calvo, and apparently also by Hall, who however regrets that no limits were set in it to the right of destroying neutral property embarked in an enemy's ship[2]. The reasoning amounts to treating a neutral's shipping goods on board an enemy as an identification of himself *pro tanto* with the enemy, the very principle on which the ancient confiscation of such goods was based, and to treating the Declaration of Paris as only partially freeing the neutral from the consequences of the identification. It amounts to a rejection of the point of view from which the Consolat del Mar proceeded, namely that belligerent property and neutral property as such stand at sea on the same mutually independent footing. Such however as it is, the reasoning seems to have taken so great a hold that at the Conference of 1907 nothing was heard about an unoffending neutral's right to an indemnity for the destruction of his goods along with that of an enemy's ship, the effort made being only to prevent or limit the destruction of neutral ships and their cargoes without bringing them in to await adjudication.

The interest felt in that part of the subject was largely due to an incident of the Russo-Japanese war. The *Knight Commander* was on her way from Hoboken in the United States of America to Japan, with a miscellaneous cargo, when she was captured by a Russian cruiser, and sunk because it was extremely difficult to bring her into port and in the undoubting opinion

[1] Prize court at Bordeaux, 27 February 1871; *commission provisoire* in place of *conseil d'état*, 16 March 1872.

[2] Calvo, 3rd edition, § 2817; Hall, § 269.

of her captors she was carrying contraband of war. The British part of the crew was taken on to Vladivostok, and the native part was put on board another vessel which happened to be passing. Notwithstanding the absence of the ship her case was brought before the Russian prize jurisdiction, in which the condemnation pronounced at Vladivostok was reversed on appeal, but not on the ground of any illegality in her destruction. Great Britain, which had taken that ground in her correspondence with Russia, submitted at the Hague in 1907 a proposal to declare that "the destruction of a neutral prize by the captor is prohibited. The captor ought to release every neutral ship which he cannot bring before a prize court." The United States submitted a proposal to the same effect. The Russian counter-proposal was as follows:

Believing that the absolute prohibition to destroy neutral prizes would place powers having no maritime bases except on their home coasts[1] in a position of inferiority, and being of opinion that every international agreement ought to be founded on the principle of reciprocity and equal opportunity, the Imperial Russian delegation submits to the consideration of the fourth committee the following disposition which appears to it to take account of all the interests involved;

The destruction of a neutral prize is prohibited except if its preservation might compromise the security of the capturing ship or the success of its operations. The commander of the capturing ship must use the right of destruction with the greatest reserve, and must take care first to tranship the men and so far as possible the cargo, also in every case to preserve all the shipping documents (*papiers de bord*) and other elements necessary for an adjudication on the prize and for fixing the indemnities due to neutrals. It is well understood that, in case of the seizure or destruction of neutral prizes recognised by the prize court or the competent authorities to have been illegal, the interested parties have a right to sue for damages.

It will be observed that the Russian argument assumes that the prohibition to destroy neutral ships cannot be claimed as a neutral right, and is therefore a subject of bargain, in which character it was not unfair to connect it with the relative practical situations which it would create for a certain class of powers. Col. Ovtchinikoff, in the discussion in the fourth committee, observed that the position of inferiority referred to

[1] *Côtes de la métropole,* which it is intended to contrast with both colonial and foreign coasts.

in the proposal would be aggravated if the regulation on the rights and duties of neutrals in maritime war, then before the third committee, should make it more difficult for belligerents and their prizes to avail themselves of neutral ports[1]. In the same discussion it was asserted in support of the British proposal that the destruction of a neutral prize is always in contradiction with the principles on the subject of neutrality, which can scarcely be consistently maintained by anyone who does not hold that the same principles condemn the destruction of an enemy ship with neutral cargo on board.

In the end the question of destroying neutral prizes was allowed to drop at the Hague, but was resumed at London with the result embodied in the Declaration of London. See below, pp. 336, 337.

Floating Mines.

There is no certainty that floating mines, even if anchored at first, will not get loose, nor even much probability that a large percentage will not get loose[2]. Thus the employment by a belligerent, even in his own territorial waters or in those of his enemy which merchantmen may be expected to avoid during war, of contact mines which do not become innocuous as soon as they get loose, is a cause, lying well within the limits of human foresight, of slaughter and damage to peaceable neutrals engaged in their lawful occupations in waters where they have a perfect right to be. During all the two years which have elapsed since the close of the Russo-Japanese war [to the date of the first edition of this work], the seas of the Far East have continued to

[1] For the extent to which this has been done see above, pp. 250, 251.

[2] "Anyone who has seen what happens even in peace manœuvres, when mines are laid for a brief period in unenclosed water, will know the impossibility after only moderately bad weather of ensuring that the mines will remain in place. It is quite common to find that some have shifted their position considerably. Mines laid in the outer anchorage of Port Arthur or at Dalny, and in the bays of either side of the Liautung peninsula, whether by the defenders or the assailants, are likely enough to break adrift in such gales as are common in the spring in the locality in question; and some of them would probably drift out into the open sea." Admiral Sir Cyprian Bridge, in the *Times* of 30 May 1904. His prophecy has been amply fulfilled.

be the scene of disasters which the employment of such mines in that contest has caused to peaceful shipping and fishermen. Now the right of a state in the waters subject to its sovereignty can certainly not rank higher than that of a private owner in the land or water which is his property. Still less, if possible, can the right of a state in the open sea, which is free to the use of all, rank higher than that of property. But no principle is more firmly established in the science of law than that which says to an owner *sic utere tuo ut alienum non laedas.* The right of sovereignty therefore does not extend to employing anywhere what may be foreseen to be engines of slaughter and damage to unoffending foreigners. The foreign government whose subjects suffer from such engines does not need to enquire whether their use is prohibited by any positive rule of international law, whether resting on recognised custom or on agreement. They are indefensible in themselves, and the foreign government concerned will be justified, not only in taking up the cause of its injured subjects, but even in interfering in order to stop the offending methods of war.

At the opening of the Conference of 1907 Great Britain proposed that the employment of unanchored automatic submarine contact mines, or of any contact mines which do not become innocuous as soon as they get loose, shall be prohibited; also that no contact mines at all shall be allowed except in the territorial waters of a belligerent or his enemy, or within a distance of ten miles from the shore batteries of a military port. Japan and Italy pleaded the usefulness of loose contact mines for ships which are being pursued, and proposed that they should be allowed on condition of their becoming innocuous within a fixed time, by accepting which on behalf of the British delegation Captain Ottley gave full scope to a spirit of conciliation. Brazil and the Netherlands wished that neutrals should be allowed to protect their own waters by contact mines, but Captain Ottley replied that electric mines would suffice for that purpose. Russia proposed to qualify the condition of becoming innocuous by inserting "as far as possible."

At one stage of the prolonged proceedings Germany offered to agree to a prohibition of all use of floating mines for five years in place of any permanent rule, which can scarcely be

otherwise interpreted than as indicating an opinion that war within five years was not probable, but Great Britain did not accept the offer. Ultimately, at the full sitting of 9 October, the emasculated convention now existing was adopted, to be in force for seven years, six months before the expiration of which time the contracting powers agree to resume the question of automatic mines. By this convention it is nominally "prohibited (1) to place unanchored contact mines not so constructed as to become innocuous an hour at most after those who have placed them have lost control over them, (2) to place anchored contact mines which do not become innocuous as soon as they have broken their moorings, and (3) to employ torpedoes which do not become innocuous when they have missed their aim": Art. 1. But this is watered down by the provision that "the contracting powers which do not yet possess perfected mines such as are contemplated by the present regulation, and which consequently cannot at present conform to Articles 1 and 3[1], undertake to transform their mines as quickly as possible, so that they may satisfy the said requirements": Art. 6. Sir Ernest Satow then read on behalf of the British delegation a statement which we insert at length, so important is its affirmation that the international law on the subject does not depend for its existence on any stipulations.

Having voted for the Mines Convention which the Conference has just accepted, the British delegation desires to declare that it cannot regard this arrangement as furnishing a final solution of the question, but only as marking a stage in international legislation on the subject. It does not consider that adequate account has been taken in the convention of the rights of neutrals to protection, or of humanitarian sentiments which cannot be neglected; it has done its best to bring the conference to share its views, but its efforts in this direction have remained without result. The high seas, gentlemen, are a great international highway. If in the present state of international law and custom belligerents are permitted to fight their battles there, it is none the less incumbent on them to do nothing which might, long after their departure from a particular place, render this highway dangerous for neutrals who have an equal right to use it. We declare without hesitation that the right of the neutral to

[1] Art. 3 does not contemplate any case additional to those mentioned in Art. 1, but makes belligerents undertake to provide as far as possible for the anchored contact mines employed by them becoming innocuous after a certain lapse of time.

security of navigation of the high seas ought to take precedence of the transitory right of the belligerent to employ these seas as the scene of the operations of war.

This convention, however, as it has been adopted, imposes on the belligerent no restriction as to the placing of anchored mines, which consequently may be laid wherever the belligerent chooses, in his own waters for self-defence, in the waters of the enemy as a means of attack, or lastly on the high seas, so that neutral navigation will inevitably run great risks in time of naval war and may be exposed to many a disaster. We have already on several occasions insisted on the danger of a situation of this kind. We have endeavoured to show what would be the effect produced by the loss of a great liner belonging to a neutral power. We did not fail to produce every argument in favour of limiting the field of action of these mines, while we called special attention to the advantages which the civilized world would gain from this restriction, as it would diminish to a certain extent the causes of armed conflicts. It appeared to us that by acceptance of the proposal made by us at the beginning of the discussion, dangers would have been obviated which in every maritime war of the future will threaten to disturb friendly relations between neutrals and belligerents. But, since the conference has not shared our views, it remains for us to declare in the most formal manner that these dangers exist, and that the certainty that they will make themselves felt in the future is due to the incomplete character of the present convention.

As, in our opinion, this constitutes only a partial and insufficient solution of the problem, it cannot, as has already been pointed out, be regarded as a complete exposition of international law on this subject. Therefore the legitimacy of a given act cannot be presumed for the mere reason that the convention has not forbidden it. That is a principle which we desired to affirm, and which could never be ignored by any state, whatever its power[1].

Baron Marschall von Bieberstein immediately made for his delegation the following reply, which embodies what we have mentioned and discussed—above, p. 126—as being the affirmative answer usually made in Germany to the question whether the laws of war are liable to be overridden by necessity.

A belligerent who lays mines assumes a very heavy responsibility towards neutrals and towards peaceful shipping. On that point we are all agreed. No one will resort to such means unless for military reasons

[1] The following formal reservation was made: "in affixing their signatures to the above convention, the British plenipotentiaries declare that the mere fact that this convention does not prohibit a particular act or proceeding must not be held to debar H. B. M.'s Government from contesting its legitimacy."

of an absolutely urgent character. But military acts are not governed solely by principles of international law. There are other factors. Conscience, good sense, and the sentiment of duty imposed by principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German navy, I loudly proclaim it (*je le dis à haute voix*), will always fulfil in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization. I have no need to tell you that I entirely recognize the importance of the codification of rules to be followed in war. But it would be well not to issue rules the strict observation of which might be rendered impossible by the force of things. It is of the first importance that the international maritime law which we desire to create should only contain clauses the execution of which is possible from a military point of view, even in exceptional circumstances. Otherwise the respect for law will be lessened and its authority undermined. Also it would seem to us to be preferable to maintain at present a certain reserve, in the expectation that seven years hence it will be easier to find a solution which will be acceptable to the whole world. As to the sentiments of humanity and civilization, I cannot admit that there is any government or country which is superior in these sentiments to that which I have the honour to represent.

Thus Germany claims the right to destroy neutral shipping and fishermen, if absolutely necessary in order that she may win in a war: Great Britain declines to be bound by Germany's necessity to win. We must repeat our conclusion that to deny the sufficiency of the British answer cannot be reconciled with there being a law between states as equals.

Another point which arose in connection with floating mines was their employment for the purpose of blockade. An article of the British proposal specifically prohibited the use of contact mines for establishing or maintaining a commercial blockade, which prohibition would also seem to result from Art. 2 of the actual convention, making it illegal "to place automatic contact mines before the coasts and ports of the enemy with the sole object of intercepting commercial navigation"; but such an article, not to mention that both Germany and France have excepted it from their acceptance of the convention, is futile, whether from the point of view of commercial blockades, which it would always be easy to establish by mines while pretending some other object, or from that of the danger which the mines would cause to innocent shipping in other waters.

An International Prize Court.

The draft of a convention for the establishment of an international prize court was adopted at the full sitting of the second Hague Conference on 21 September 1907. The amount of approval to which the voting testified leaves little doubt but that such a convention will be concluded in the near future, although at present Great Britain has not ratified the one so adopted, and many of the smaller powers have made reservations as to the nomination and rotation of judges.

We have seen that under the earliest custom which can be regarded as law even for a limited area of sea, the admiral determined what was to be done in relation to prizes taken by any ship under his command, and that this soon came to be the rule even when the authority which he represented was not that of a city but that of a monarchy, and the prizes of which he was the judge may be said to have been taken under his auspices but scarcely under his command[1]. From the point of view of his fellow-citizens or of his sovereign, to see that ships or goods were not wrongfully captured, and that the value of lawful captures came to the hands entitled to receive it as a regalian right or as prizemoney, belonged to the duty of the admiral as responsible for the discipline of the fleet or navy. From the point of view of foreigners, whether belligerents or neutrals, it was inevitable that they should have to deal in the first instance with some officer of the captors, who might as well be the admiral as any other judge. If they were dissatisfied with his decision, he wielded no authority which bound them, and their city or their prince might take up their cause. On this footing the matter has rested ever since. Questions of prize have always been matters of the domestic jurisdiction of the captor's country, commonly called the admiralty jurisdiction from its original form, by whatever name the branch exercising it may be known in any modern system of procedure. It is open to all those of any nationality whose interests may be affected by its decisions, and it is the duty of its judges, a duty in which they have seldom failed in any civilised country, to do justice to them all

[1] See above, pp. 137–140.

with strict impartiality[1]. In that sense a court of admiralty is an international one, but in that sense only, for the law which it administers cannot help bearing the impress of its own nationality.

A court must take its law from the authority under which it sits, and for a court of admiralty that authority has never been any other than that of its own country. It must apply any rules on international questions which it finds to be generally agreed on, a condition which involves the agreement of its own country with them. Where there is no general agreement and the supreme authority of its own country has not taken a decided line, the court must take that line which justice appears to it to require, whether favourable or not to a fellow subject being a party before it, or to what it may conceive to be the interest of its country. But where the supreme authority under which it sits has taken a decided line, a court of admiralty, like any other court, can only obey. Thus we have seen the English parliament and privy council determining from time to time whether neutral goods in enemy ships should be deemed lawful prize, and the English admiralty deciding one way in 1357 and the other way two centuries and a half afterwards[2]. When the famous Orders in Council laid down rules as to neutral shipping for the then naval war which were certainly not justifiable otherwise than by way of retorsion against the Berlin and Milan decrees, the British admiralty did not and could not presume either to refuse execution to the orders, or to exercise an independent judgment as to their justification. And courts of admiralty have always held themselves bound to give effect to the treaties of their countries on points of international law, such treaties being another mode in which the will on those points of the authority under which they sit expresses itself.

This being so, it has followed that the decisions of courts of admiralty on prize law have never been considered to be binding on foreigners.

They are final as judgments, when carried up to the highest

[1] See Chief Justice Marshall's appreciation of Lord Stowell, quoted above, p. 164, n. 1.

[2] See above, pp. 139–143.

domestic court of appeal, because there has hitherto been no other court to which a further appeal could be made, and the individual losing party is therefore left helpless by them. But they have not been considered final settlements as against the government of the losing individuals, if it sees fit to espouse their cause, and on many occasions that government and the government of the prize court have entered into conventions under which the judgments complained of have been reviewed by mixed commissions, and damages have been paid by the state of which the prize court has thus been found to have pronounced erroneous judgments. A remarkable case is that of the treaty between Great Britain and the United States under which judgments of the Supreme Court of the latter, in prize cases arising during the War of Secession, were reviewed by a mixed commission on the complaint of subjects of the former. But the tardy justice done by mixed commissions, instituted after the close of a war with much diplomatic toil and as the result of much international friction, and then only when the grievances complained of by individuals amount to a sum sufficient to induce their government to seek an extraordinary remedy, has rather made apparent than effectually supplemented the inadequacy of the jurisdiction in prize cases. It is anomalous that the lawfulness of a capture should, so far as jurisdiction is concerned, be finally determined by the captor's state. And while neutral powers, for their own ease, leave to belligerents the repression of their subjects' enterprises in the matters of contraband and blockade, it is absurd that the one-sided character of the only jurisdiction existing should burden them, after all, with the diplomatic protection of their subjects against abuses of the power so left to belligerents.

Hence it has long been a desideratum that there should be established for prize cases a jurisdiction based on international authority, binding on all the parties to any suit, of which therefore the last word should be final even as against intervention by governments. Mixed commissions, resting in each case on the submission of the states who are parties to them, are arbitrations. What is wanted is not an arbitration, but something to which any party can address himself without being obliged to produce a submission from his antagonist, in

other words a jurisdiction. The possibility of this has been mooted both by individual thinkers and by private bodies like the Institute of International Law, and in 1907 received its first official recognition through the action of Great Britain and Germany, which submitted independent schemes to the conference. In the convention which now awaits binding authority the scope of the court's jurisdiction and the law to be applied by it appear from the following articles.

Art. 1. The validity of the capture of a merchant ship or of her cargo, whether neutral or enemy property is in question, is established before a prize jurisdiction conformably to the present convention.

Art. 2. Prize jurisdiction is exercised in the first instance by the prize courts of the capturing belligerent. The decisions of those courts are either given at a public sitting or officially notified to the neutral or enemy parties.

Art. 3. The decisions of the national prize courts of first instance may be the subject of appeal to the International Prize Court:

(1) When they concern the property of a neutral power or person;

(2) When they concern enemy property, and the case is one

(*a*) of goods loaded on board a neutral ship, or

(*b*) of an enemy ship captured in the territorial waters of a neutral power which has not made such capture the subject of a diplomatic demand, or

(*c*) of a demand founded on the allegation that the capture was made in breach of a convention in force between the belligerent powers, or of a law of the capturing belligerent.

The appeal from the national prize court of first instance may be on a question either of law or of fact.

These articles are in accordance with the German plan. The British plan—which, besides, gave the International Court jurisdiction only in matters affecting neutrals—allowed an appeal to it only from the highest national court accessible to the neutral power or its subjects, and gave the right of appeal only to the neutral power and not to a private individual. The first of these restrictions would have protracted litigations through an unnecessary number of instances, and the second would have imposed on the neutral government the burden of deciding whether it should adopt the complaint of its subject, while, if its decision on that point was adverse, complete satisfaction would not be given. The German delegation in

particular objected to a government's being enabled to withhold its cooperation for political motives.

Art. 4 distributes the right of appeal according to the interests affected, except that a neutral power may forbid its subject to appeal or may itself appeal in his place—which does not quite meet the German view mentioned—and that the appeal in the case of Art. 3, (2), (*b*) is given only to the neutral state.

Art. 5 is technical. Art. 6 provides that where the International Court is competent there can be only one national instance after the first, and that the International Court may be approached directly where a final national decision has not been given within two years from the date of the capture.

Art. 7. If the question of law to be decided is provided for by a convention in force between the capturing belligerent and the power which or a subject of which is a party to the suit, the court follows the stipulations of that convention. In default of such stipulations the court applies the rules of international law. If there are no rules generally recognised, the court decides according to the general principles of justice and equity.

The above dispositions apply to what concerns the order of proofs as well as to the legal grounds (*les moyens qui peuvent être employés*).

If under Art. 3, (2), (*c*) the appeal is founded on the breach of a law of the capturing belligerent, the court applies that law. The court is at liberty to take no account of a party's being put out of court by the rules of procedure of the capturing belligerent, if it considers that such an effect is contrary to justice and equity.

The terms in which Art. 7 thus describes the law to be applied on the appeal require a careful examination. It is beyond question that relevant conventions must hold the first rank, and rules of international law which are generally recognised the second. But it is less clear in what sense all that is not concluded by one of those tests is referred to justice and equity. The school of "the Law of Nature and Nations," which succeeded to the school of Grotius and did not share that great man's reverence for facts, was ready to impose solutions of all international questions as the result of pure reason, and would have made short work of any dissents from its conclusions, even if supported by a considerable body of practice. It is true that this school is now much discredited, and in England

especially, when reasoning has to be resorted to on the affairs of nations, the appeal is made to justice and the law of nature is rarely mentioned. Elsewhere however "the law of nature" or "the primary law" is still mentioned often enough to prevent one's feeling quite sure whether the notions once connected with it may not survive to such an extent as to influence the judgment about what justice and equity demand.

The subject is one which so imperatively demands frankness that I will illustrate it by examples, and they shall not be taken from topics covered by the Declaration of Paris, the rules of which may well be treated as now generally recognised. Is the notice of blockade, to which a ship desiring to enter a blockaded port is entitled, to be measured by the British or French rules? Is conditional contraband to be allowed? If not, can coal and provisions ever be absolute contraband? Does the declaration of the commander of a neutral convoy exclude the right of search[1]? These and many others are questions on which it cannot be said that any rules are generally recognised. By leaving them to justice and equity, is it meant that they are left quite open for the International Prize Court to deal with as if they had never been raised before they came before it, as writers belonging to the school of the Law of Nature and Nations would have done? Or is it meant that a wholly different class of considerations may be taken into account? The appeal will lie from a national court bound by its sovereign's view of the law, and it is not just or equitable for a court of appeal to reverse a judgment which the court below was right in giving. The convention, if entered into, will not have been intended to transfer the jurisdiction from the national courts to the International Prize Court, but to afford a remedy for abuses in its exercise. Only in the case contemplated by Art. 6, where there will have been laches on the part of the proper jurisdiction, can the International Prize Court act as one of first instance. In every other case it will be dealing with a national pronouncement which justice and equity will forbid its reversing when it was founded on a view of international rights seriously entertained by the state in

[1] All these questions have been dealt with by the Declaration of London since they were thus cited in the first edition of this work.

question, and not ousted by stipulation or general recognition to the contrary.

M. Renault, as reporter at the Hague in 1907 on behalf of the sub-committee which prepared the draft (*comité d'examen de la seconde sous-commission*), fully admitted the strength of the latter view. "What," he said, "will happen if positive law, written or customary, is silent? The solution dictated by the strict principles of juridical reasoning does not appear doubtful. In default of an international rule firmly established, the international jurisdiction will apply the law of the captor. No doubt it is easy to object that we shall so have a very variable law, often very arbitrary and even such as to shock us, certain belligerents using to an excess the latitude left by positive law. That would be a reason for hastening the codification of the latter, in order to efface the gaps and uncertainties which are complained of, and which cause the difficult situation that has been pointed out." But he went on to say: "Nevertheless, after mature reflection, we think it our duty to propose to you a solution, bold without doubt, but of such a nature as seriously to ameliorate the practice of international law." Then he stated the formula adopted in Art. 7, and proceeded: "The court is thus called on to make the law (*faire le droit*), and to take account of principles other than those to which the national prize jurisdiction, of which the decision is attacked before the International Court, was subject. We are confident that the magistrates chosen by the powers will rise to the height of their mission, and will exercise it with moderation and firmness. They will point practice in the direction of justice without upsetting it. Let us then admit that a court composed of eminent magistrates shall be charged with supplying the insufficiencies of positive law, until the codification of international law, regularly pursued by governments, comes to simplify its task[1]."

It is therefore certain that the learned reporter intended, in default of stipulation and general agreement, to invest the International Prize Court with the mission claimed by a Pufendorff, only trusting to its moderation in exercising it. There are no doubt minor points on which the court might

[1] *Courrier de la Conférence*, no. 75, 10 September 1907.

usefully build up a practice, or decide in particular cases where it would be difficult to embody a practice in terms of any generality. For instance, after what happened during the South African War a claim to search for contraband at any distance from the ship's destination cannot be said to be generally recognised[1], and the court might be trusted to decide whether any particular search was too remote, while if a rule of any generality resulted from such decisions it might be thankfully accepted. But in the light of M. Renault's report it is certain that the adopted draft of 1907 would be interpreted to put in the power of the court those major points of which I have given examples, and on which the inveteracy of the differences is proved by the failure of the same conference to settle them. I cannot therefore advise the conclusion of a convention in the terms of that draft unless the law of the captor be put in the last place in Art. 7, or at least unless Art. 7 be fenced by a proviso that the judgment of a court of any state shall not be reversed because it gives effect to a view of international law seriously maintained by that state[2]. Under such conditions an International Prize Court would still have great functions to perform, and would in my judgment be a valuable improvement on the present system.

[1] See above, p. 292.

[2] These sentences of my first edition may stand as a warning that, before any international prize court is agreed to, the Declaration of London, or whatever other body of rules may be adopted as collateral to such a court, should be carefully examined as to whether they leave open any question of which we could not tolerate a solution adverse to the British view.

APPENDIX.

THE DECLARATION OF LONDON.

The *Declaration of London,* as the largest body of rules for naval war that as yet enjoys even a qualified official character, holds, even during its unratified existence, a position similar to that which the *Code of the Brussels Conference*—above, p. 60—held for land war before the appearance of the Hague Code of 1899. The influence which it must have on practice and opinion has been pointed out above, at p. 256. It has therefore been thought well to give it here at length, omitting only the formal parts, in the British official translation.

Declaration concerning the Laws of Naval War.

[The states represented—see above, p. 255],

Having regard to the terms in which the British Government invited various Powers to meet in conference in order to arrive at an agreement as to what are the generally recognized rules of international law within the meaning of Article 7 of the Convention of 18th October, 1907, relative to the establishment of an International Prize Court;

Recognizing all the advantages which an agreement as to the said rules would, in the unfortunate event of a naval war, present, both as regards peaceful commerce, and as regards the belligerents and their diplomatic relations with neutral Governments;

Having regard to the divergence often found in the methods by which it is sought to apply in practice the general principles of international law;

Animated by the desire to insure henceforward a greater measure of uniformity in this respect;

Hoping that a work so important to the common welfare will meet with general approval;

Have appointed as their Plenipotentiaries, that is to say [naming them]:

Who, after having communicated their full powers, found to be in good and due form, have agreed to make the present Declaration:—

Preliminary Provision.

The Signatory Powers are agreed that the rules contained in the following Chapters correspond in substance with the generally recognized principles of international law.

CHAPTER I.

Blockade in time of War.

ART. 1. A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy.

ART. 2. In accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective—that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coastline.

ART. 3. The question whether a blockade is effective is a question of fact.

ART. 4. A blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather.

ART. 5. A blockade must be applied impartially to the ships of all nations.

ART. 6. The commander of a blockading force may give permission to a warship to enter, and subsequently to leave, a blockaded port.

ART. 7. In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo there.

ART. 8. A blockade, in order to be binding, must be declared in accordance with Article 9, and notified in accordance with Articles 11 and 16.

ART. 9. A declaration of blockade is made either by the blockading Power or by the naval authorities acting in its name.

It specifies—

(1) The date when the blockade begins;

(2) The geographical limits of the coastline under blockade;

(3) The period within which neutral vessels may come out.

ART. 10. If the operations of the blockading Power, or of the naval authorities acting in its name, do not tally with the particulars which, in accordance with Article 9 (1) and (2), must be inserted in the declaration of blockade, the declaration is void, and a new declaration is necessary in order to make the blockade operative.

ART. 11. A declaration of blockade is notified—

(1) To neutral Powers, by the blockading Power by means of a communication addressed to the Governments direct, or to their representatives accredited to it;

(2) To the local authorities, by the officer commanding the blockading force. The local authorities will, in turn, inform the foreign consular officers at the port or on the coastline under blockade as soon as possible.

ART. 12. The rules as to declaration and notification of blockade apply to cases where the limits of a blockade are extended, or where a blockade is re-established after having been raised.

ART. 13. The voluntary raising of a blockade, as also any restriction in the limits of a blockade, must be notified in the manner prescribed by Article 11.

ART. 14. The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade.

ART. 15. Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the Power to which such port belongs, provided that such notification was made in sufficient time.

ART. 16. If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's logbook, and must state the day and hour, and the geographical position of the vessel at the time.

If through the negligence of the officer commanding the blockading force no declaration of blockade has been notified to the local authorities, or, if in the declaration, as notified, no period has been mentioned within which neutral vessels may come out, a neutral vessel coming out of the blockaded port must be allowed to pass free.

ART. 17. Neutral vessels may not be captured for breach of blockade except within the area of operations of the warships detailed to render the blockade effective.

ART. 18. The blockading forces must not bar access to neutral ports or coasts.

ART. 19. Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port.

ART. 20. A vessel which has broken blockade outwards, or which has attempted to break blockade inwards, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected.

ART. 21. A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned, unless it is proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade.

Chapter II.

Contraband of War.

Art. 22. The following articles may, without notice, be treated as contraband of war, under the name of absolute contraband:—

(1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.

(2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.

(3) Powder and explosives specially prepared for use in war.

(4) Gun-mountings, limber boxes, limbers, military waggons, field forges, and their distinctive component parts.

(5) Clothing and equipment of a distinctively military character.

(6) All kinds of harness of a distinctively military character.

(7) Saddle, draught, and pack animals suitable for use in war.

(8) Articles of camp equipment, and their distinctive component parts.

(9) Armour plates.

(10) Warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war.

(11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.

Art. 23. Articles exclusively used for war may be added to the list of absolute contraband by a declaration, which must be notified.

Such notification must be addressed to the Governments of other Powers, or to their representatives accredited to the Power making the declaration. A notification made after the outbreak of hostilities is addressed only to neutral Powers.

ART. 24. The following articles, susceptible of use in war as well as for purposes of peace, may, without notice, be treated as contraband of war, under the name of conditional contraband:—

(1) Foodstuffs.

(2) Forage and grain, suitable for feeding animals.

(3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.

(4) Gold and silver in coin or bullion; paper money.

(5) Vehicles of all kinds available for use in war, and their component parts.

(6) Vessels, craft, and boats of all kinds; floating docks, parts of docks and their component parts.

(7) Railway material, both fixed and rolling-stock, and material for telegraphs, wireless telegraphs, and telephones.

(8) Balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines.

(9) Fuel; lubricants.

(10) Powder and explosives not specially prepared for use in war.

(11) Barbed wire and implements for fixing and cutting the same.

(12) Horseshoes and shoeing materials.

(13) Harness and saddlery.

(14) Field glasses, telescopes, chronometers, and all kinds of nautical instruments.

ART. 25. Articles susceptible of use in war as well as for purposes of peace, other than those enumerated in Articles 22 and 24, may be added to the list of conditional contraband by a declaration, which must be notified in the manner provided for in the second paragraph of Article 23.

ART. 26. If a Power waives, so far as it is concerned, the right to treat as contraband of war an article comprised in any of the classes enumerated in Articles 22 and 24, such intention shall be announced by a declaration, which must be notified in the manner provided for in the second paragraph of Article 23.

ART. 27. Articles which are not susceptible of use in war may not be declared contraband of war.

ART. 28. The following may not be declared contraband of war:—

(1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.

(2) Oil seeds and nuts; copra.

(3) Rubber, resins, gums, and lacs; hops.

(4) Raw hides and horns, bones, and ivory.

(5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.

(6) Metallic ores.

(7) Earths, clays, lime, chalk, stone, including marble, bricks, slates, and tiles.

(8) Chinaware and glass.

(9) Paper and paper-making materials.

(10) Soap, paint and colours, including articles exclusively used in their manufacture, and varnish.

(11) Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.

(12) Agricultural, mining, textile, and printing machinery.

(13) Precious and semi-precious stones, pearls, mother-of-pearl, and coral.

(14) Clocks and watches, other than chronometers.

(15) Fashion and fancy goods.

(16) Feathers of all kinds, hairs, and bristles.

(17) Articles of household furniture and decoration; office furniture and requisites.

ART. 29. Likewise the following may not be treated as contraband of war:—

(1) Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Article 30.

(2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.

ART. 30. Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transhipment or a subsequent transport by land.

ART. 31. Proof of the destination specified in Article 30 is complete in the following cases:—

(1) When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy.

(2) When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented.

ART. 32. Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged, unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation.

ART. 33. Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4).

ART. 34. The destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband.

In cases where the above presumptions do not arise, the destination is presumed to be innocent.

The presumptions set up by this Article may be rebutted.

ART. 35. Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.

The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.

ART. 36. Notwithstanding the provisions of Article 35, conditional contraband, if shown to have the destination referred to in Article 33, is liable to capture in cases where the enemy country has no seaboard.

ART. 37. A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination.

ART. 38. A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end.

ART. 39. Contraband goods are liable to condemnation.

ART. 40. A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.

ART. 41. If a vessel carrying contraband is released, she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national prize court and the custody of the ship and cargo during the proceedings.

ART. 42. Goods which belong to the owner of the contraband and are on board the same vessel are liable to condemnation.

ART. 43. If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in Article 41. The same rule applies if the master, after becoming aware of the outbreak of hostilities, or of the declaration of contraband, has had no opportunity of discharging the contraband.

A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the Power to which such port belongs of the outbreak of hostilities or of the declaration of contraband respectively, provided that such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities.

ART. 44. A vessel which has been stopped on the ground that she is carrying contraband, and which is not liable to condemnation on account of the proportion of contraband on board, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent warship.

The delivery of the contraband must be entered by the captor on the logbook of the vessel stopped, and the master must give the captor duly certified copies of all relevant papers.

The captor is at liberty to destroy the contraband that has been handed over to him under these conditions.

CHAPTER III.

Unneutral Service.

ART. 45. A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband:—

(1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied

in the armed forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy.

(2) If, to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy.

In the cases specified under the above heads, goods belonging to the owner of the vessel are likewise liable to condemnation.

The provisions of the present Article do not apply if the vessel is encountered at sea while unaware of the outbreak of hostilities, or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers. The vessel is deemed to be aware of the existence of a state of war if she left an enemy port subsequently to the outbreak of hostilities, or a neutral port subsequently to the notification of the outbreak of hostilities to the Power to which such port belongs, provided that such notification was made in sufficient time.

ART. 46. A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel:

(1) If she takes a direct part in the hostilities;

(2) If she is under the orders or control of an agent placed on board by the enemy Government;

(3) If she is in the exclusive employment of the enemy Government;

(4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

In the cases covered by the present Article, goods belonging to the owner of the vessel are likewise liable to condemnation.

ART. 47. Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel may be made a prisoner of war, even though there be no ground for the capture of the vessel.

Chapter IV.

Destruction of Neutral Prizes.

Art. 48. A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.

Art. 49. As an exception, a neutral vessel which has been captured by a belligerent warship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time.

Art. 50. Before the vessel is destroyed all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the warship.

Art. 51. A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity of the nature contemplated in Article 49. If he fails to do this, he must compensate the parties interested and no examination shall be made of the question whether the capture was valid or not.

Art. 52. If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested, in place of the restitution to which they would have been entitled.

Art. 53. If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.

Art. 54. The captor has the right to demand the handing over, or to proceed himself to the destruction, of any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as

would, under Article 49, justify the destruction of a vessel herself liable to condemnation. The captor must enter the goods surrendered or destroyed in the logbook of the vessel stopped, and must obtain duly certified copies of all relevant papers. When the goods have been handed over or destroyed, and the formalities duly carried out, the master must be allowed to continue his voyage.

The provisions of Articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable.

Chapter V.

Transfer to a Neutral Flag.

Art. 55. The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted.

Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

Art. 56. The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

There, however, is an absolute presumption that a transfer is void—

(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If a right to repurchase or recover the vessel is reserved to the vendor.

(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled.

Chapter VI.

Enemy Character.

Art. 57. Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly.

The case where a neutral vessel is engaged in a trade which is closed in time of peace remains outside the scope of, and is in no wise affected by, this rule.

Art. 58. The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner.

Art. 59. In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods.

Art. 60. Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognized legal right to recover the goods, they regain their neutral character.

Chapter VII.

Convoy.

Art. 61. Neutral vessels under national convoy are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent warship, all information as to the character of the vessels and their cargoes which could be obtained by search.

Art. 62. If the commander of the belligerent warship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him.

In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed to the officer of the warship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels.

Chapter VIII.

Resistance to Search.

Art. 63. Forcible resistance to the legitimate exercise of the right of stoppage, search, and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods.

Chapter IX.

Compensation.

Art. 64. If the capture of a vessel or of goods is not upheld by the prize court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods.

Final Provisions.

Art. 65. The provisions of the present Declaration must be treated as a whole, and cannot be separated.

Art. 66. The Signatory Powers undertake to insure the mutual observance of the rules contained in the present Declaration in any war in which all the belligerents are parties thereto. They will therefore issue the necessary instructions to their authorities and to their armed forces, and will take such measures as may be required in order to insure that it will be applied by their courts, and more particularly by their prize courts.

Art. 67. The present Declaration shall be ratified as soon as possible.

The ratifications shall be deposited in London.

The first deposit of ratifications shall be recorded in a Protocol signed by the Representatives of the Powers taking

part therein, and by His Britannic Majesty's Principal Secretary of State for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification addressed to the British Government, and accompanied by the instrument of ratification.

A duly certified copy of the Protocol relating to the first deposit of ratifications, and of the notifications mentioned in the preceding paragraph as well as of the instruments of ratification which accompany them, shall be immediately sent by the British Government, through the diplomatic channel, to the Signatory Powers. The said Government shall, in the cases contemplated in the preceding paragraph, inform them at the same time of the date on which it received the notification.

ART. 68. The present Declaration shall take effect, in the case of the Powers which were parties to the first deposit of ratifications, sixty days after the date of the Protocol recording such deposit, and, in the case of the Powers which shall ratify subsequently, sixty days after the notification of their ratification shall have been received by the British Government.

ART. 69. In the event of one of the Signatory Powers wishing to denounce the present Declaration, such denunciation can only be made to take effect at the end of a period of twelve years, beginning sixty days after the first deposit of ratifications, and, after that time, at the end of successive periods of six years, of which the first will begin at the end of the period of twelve years.

Such denunciation must be notified in writing, at least one year in advance, to the British Government, which shall inform all the other Powers.

It will only operate in respect of the denouncing Power.

ART. 70. The Powers represented at the London Naval Conference attach particular importance to the general recognition of the rules which they have adopted, and therefore express the hope that the Powers which were not represented there will accede to the present Declaration. They request the British Government to invite them to do so.

Done at London, the 26th day of February, 1909.

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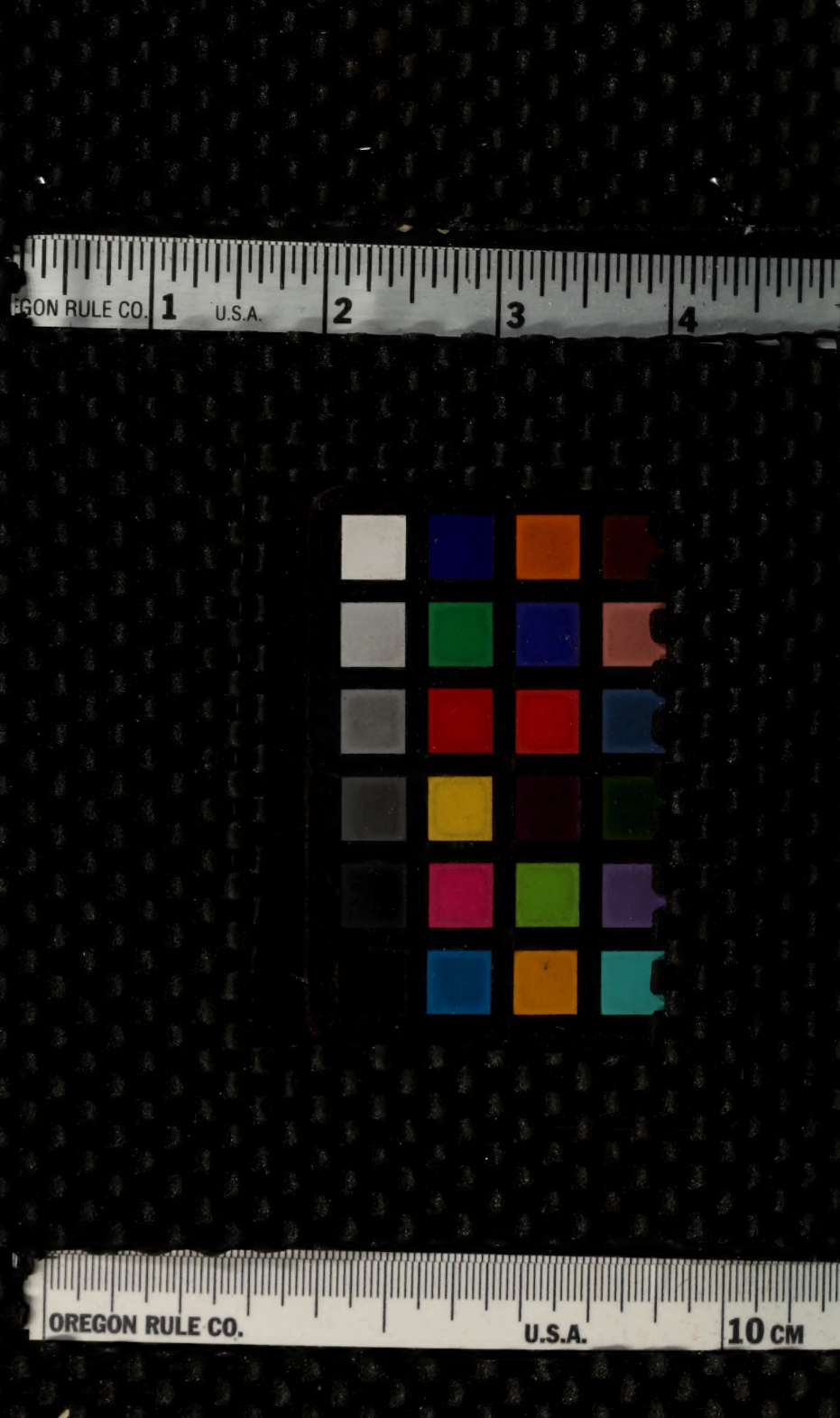
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